JOSEPH H. HUNT
Assistant Attorney General
SCOTT G. STEWART
Deputy Assistant Attorney General
AUGUST E. FLENTJE
Special Counsel
WILLIAM C. PEACHEY
Director
EREZ REUVENI
Assistant Director
Office of Immigration Litigation
U.S. Department of Justice, Civil Division
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
Tel: (202) 307-4293
Email: Erez.R.Reuveni@usdoj.gov
PATRICK GLEN
Senior Litigation Counsel
JOSEPH A. DARROW
FRANCESCA GENOVA
KATHRYNE M. GRAY
CHRISTINA GREER
BENTON YORK
Trial Attorneys

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

O.A., *et al.*, Plaintiffs, v. Donald J. Trump, President of the United States, *et al.*, Defendants.	Civil Action No. 1:18-cv-02718-RDM

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INTRODUCTION

This Court should deny Plaintiffs' request to enjoin a critical regulation designed to address an urgent situation at the southern border, where waves of thousands of aliens have entered the country unlawfully, putting themselves and others at risk, and have then asserted baseless asylum claims to avoid removal.

The President, relying on his "broad discretion to suspend the entry of aliens into the United States" through proclamation, *Trump v. Hawaii*, 138 S. Ct. 2392, 2408 (2018), determined that entry must be temporarily suspended for the large number of aliens transiting Mexico who, rather than properly presenting themselves at a port of entry, violate our criminal law and endanger themselves, any children accompanying them, and U.S. law enforcement officers by entering the country illegally. The President sought to halt this dangerous and illegal practice and regain control of the southern border. The Attorney General and Secretary of Homeland Security, exercising their broad and express statutory authority, determined by regulation that those who enter the country in contravention of such a Presidential proclamation will not be eligible for the discretionary benefit of asylum. Such aliens can still establish eligibility for withholding of removal or protection under the regulations implementing the Convention Against Torture, so they will not be sent back to countries where they are more likely than not to face persecution or torture. The rule and proclamation together discourage illegal entry by those who might evade detection or if caught misuse the asylum process to gain release into the United States, channel aliens to ports of entry so asylum claims may be processed in an orderly way, encourage aliens to apply for asylum in other countries they enter before reaching the United States, and facilitate negotiations with Mexico and other countries to prevent unlawful mass migration to the United States.

Plaintiffs are six aliens who demand immediate relief halting these policies, even though Plaintiffs have not had those policies applied to them. This Court should deny Plaintiffs' extraordinary request.

To start, Plaintiffs' claims are not justiciable. Plaintiffs' claims of subject-matter jurisdiction contravene the channels that Congress prescribed for aliens to challenge an aspect of their removal, including their eligibility for asylum. Five Plaintiffs have been issued notices to

appear for removal proceedings under 8 U.S.C. § 1229a, and Congress has required them to raise any legal challenges to their eligibility for asylum in those proceedings—not in district court. *See* 8 U.S.C. § 1252(a)(5), (b)(9). The remaining Plaintiff may never be subject to the policies and is currently being criminally prosecuted for illegal entry. Even if this Court had jurisdiction, Plaintiffs would still lack Article III standing because the rule has not been applied to them and thus has not caused any of them an injury in fact.

Plaintiffs' claims all also fail on the merits. Plaintiffs contend that the new asylum-ineligibility rule and proclamation conflict with 8 U.S.C. § 1158(a)(1), which states that an "alien who is physically present in the United States or who arrives in the United States . . . , irrespective of such alien's status, may apply for asylum." But though § 1158 allows unlawful entrants *to apply* for asylum, 8 U.S.C. § 1158(a)(1), it also confers broad discretion on the Attorney General and Secretary as to whether *to grant* asylum, *id.* § 1158(b)(1)(A), including broad authority to adopt categorical "limitations and conditions" on asylum eligibility, *id.* § 1158(b)(2)(C). Indeed, Plaintiffs agree that the Executive Branch may create categorical rules barring asylum eligibility and may deny individual aliens asylum based on their unlawful entry. TRO Br. 27 n.41. Given that, there is no basis for arguing, as Plaintiffs do, that the rule cannot categorically render aliens ineligible for asylum based on a type of unlawful entry that is determined to warrant special attention and concern—entry at a particular place (the southern border) during a particular time (the duration of an applicable Presidential proclamation) aimed at addressing a particular urgent crisis at the border (dangerous unlawful entries by aliens with no valid claim for asylum who nonetheless threaten to overwhelm the asylum system) and aiding international negotiations (aimed at stemming that crisis long term). Plaintiffs also contend the asylum rule conflicts with the Immigration and Nationality Act's (INA) provisions governing expedited removal, 8 U.S.C. § 1225(b)(1)(B)(ii), because that provision requires that eligibility bars not be applied in expedited removal proceedings. That too is wrong. Nothing about the expedited removal statute requires the government to refer an alien to full removal proceedings to raise an asylum claim that they are not eligible for; instead, the opposite is true: the expedited removal regime provides that ineligible aliens can be removed expeditiously. Equally baseless is Plaintiffs' argument that the rule conflicts

with the Trafficking Victims Protection Reauthorization Act's (TVPRA) provisions governing unaccompanied alien children (8 U.S.C. § 1232(a)(5)(D)). The proclamation makes clear it does not alter TVPRA procedures. Plaintiffs also suggest that the President has usurped the Attorney General's discretionary authority over asylum under § 1158 for aliens on U.S. soil by issuing a proclamation suspending entry under 8 U.S.C. § 1182(f). This too is wrong. Section 1182(f) concerns restrictions on entry—a matter over which Plaintiffs concede the President has broad authority; § 1158 concerns the separate issue of which aliens are eligible to apply for or receive asylum, which is a matter that the rule, rather than the proclamation, addresses.

Plaintiffs contend as well that the rule was issued by Acting Attorney General Matthew G. Whitaker, and thus violates the Appointments Clause and the Attorney General Succession Act. But this claim rests on the factually erroneous assumption that the Department of Justice submitted the rule to the Office of the Federal Register after Attorney General Sessions resigned.

The Court should also reject Plaintiffs' Administrative Procedure Act (APA) procedural challenges. The agencies lawfully issued the regulation here as an interim final rule. The agencies had good cause to dispense with notice-and-comment rulemaking and a delayed effective date because notice-and-comment rulemaking would cause the very harms the rule is meant to prevent, and because the rule is part of ongoing diplomatic negotiations with Mexico and Northern Triangle countries aimed at resolving the crisis at the southern border. *See* 5 U.S.C. § 553(b)(B), (d)(3). For similar reasons, the foreign-affairs exception also applies. *See id.* § 553(a)(1).

Finally, Plaintiffs' request for a TRO or preliminary injunction must independently fall because they cannot establish that the balance of harms warrants drastic and immediate injunctive relief—particularly since no Plaintiff has been injured by the rule. The Executive Branch, exercising its authority over the border and foreign affairs, has determined that the rule is urgently needed to combat the migration crisis at the southern border, which needlessly endangers the lives of migrants, children, and federal officers. The provisions of the rule challenged by Plaintiffs here also have already been enjoined on a nationwide basis by another district court. And even were that not so, Plaintiffs themselves cannot show imminent harm given their pending removal proceedings. So Plaintiffs are not facing ongoing or imminent irreparable harm that would justify

a duplicative injunction. In any event, the rule and proclamation aim to promote safety and save lives by discouraging aliens from making dangerous, unlawful border crossings. And the Executive Branch has a paramount sovereign interest in maintaining the integrity of the United States' borders, in enforcing the immigration laws, and in ensuring that immigration cases can be adjudicated swiftly.

LEGAL AND PROCEDURAL BACKGROUND

Legal Background. The President has broad constitutional power to exclude aliens. *See United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950). Congress has, in turn, recognized the need for the President to regulate the flow of aliens into the United States, and has empowered the President to suspend or limit the entry of aliens when doing so is in the national interest and to impose regulations on the entry and departure of aliens. 8 U.S.C. §§ 1182(f), 1185(a).

Under 8 U.S.C. § 1158(a), "[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival . . .), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, [8 U.S.C. § 1225(b)]." 8 U.S.C. § 1158(a)(1). Even under that general rule allowing an alien to apply for asylum, § 1158(a) limits that general rule: it generally bars an alien from even applying for asylum unless he files an application within a year after his arrival, *id.* § 1158(a)(2)(B); requires that he has not "previously applied for asylum and had such application denied," *id.* § 1158(a)(2)(C); and provides that he may be removed under a safe-third-country agreement (which requires aliens to apply for asylum in the first country they arrive in), *id.* § 1158(a)(2)(A). And although § 1158 provides a broad right to *apply* for asylum, a grant of asylum is discretionary and is subject to numerous eligibility bars. As § 1158(b) states, asylum "*may* [be] grant[ed] to an alien who has applied," *id*. § 1158(b)(1)(A), and even then it may be granted only if the alien satisfies certain statutory standards and is not subject to an eligibility bar, *see id.* § 1158(b)(1)(B), (2). As part of the overarching executive discretion imbuing § 1158's asylum framework, "[t]he Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum." *Id.* § 1158(b)(2)(C). The

Attorney General has exercised his authority to exclude categories of aliens from being eligible to receive asylum several times since the asylum statute was enacted in 1980. *See* Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations, 83 Fed. Reg. 55934, 55937-38 (Nov. 9, 2018) (citing examples). Besides the discretionary authority to grant asylum, the United States has a mandatory duty to provide two forms of protection from removal: withholding of removal (available when an alien establishes a probability of persecution if returned to a particular country) and protection under the Convention Against Torture (CAT) (available when an alien establishes a probability of torture if returned). *See id.* § 1231(b)(3)(A) (withholding); 8 C.F.R. §§ 208.16(b) 1208.16(b) (same); *id.* §§ 208.16(c), 1208.16(c) (CAT).

An alien abroad has no right to enter the United States. *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972). It is a crime for an alien to enter the United States without presenting himself for inspection at a port of entry. *See* 8 U.S.C. §§ 1325, 1326. Expedited removal procedures—streamlined procedures for promptly reviewing aliens' claims and removing certain aliens—apply to certain aliens who arrive at a port of entry without valid travel documents or who are apprehended shortly after illegally crossing the border. *Id.* § 1225(b). Aliens in expedited removal proceedings shall be "removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under [§ 1158] or a fear of persecution." *Id.* § 1225(b)(1)(A)(i). Such aliens are referred for an interview in which they must demonstrate a "credible fear"—a "significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under [§ 1158]." *Id.* § 1225(b)(1)(B). Regulations also provide for asylum officers to consider such a request under the standard for withholding or CAT protection. *See* 8 C.F.R. § 208.30(e)(3)-(4). If the asylum officer determines that the alien does not have a credible fear and an immigration judge (IJ) agrees, then the alien is removed from the United States without further review of the asylum claim. 8 U.S.C. § 1225(b)(1)(B)(iii)(I), (III), (b)(1)(C); *id*. § 1252(a)(2)(A)(iii), (e)(2). If the officer or the IJ determines that the alien has a credible fear, then the alien is placed in ordinary (full) removal proceedings under 8 U.S.C. § 1229a. *Id.* § 1225(b)(1)(B)(ii); 8 C.F.R. § 208.30(f). Other

procedures are used in other contexts to address screening for withholding or CAT protection. This "reasonable fear" screening is similar to the credible-fear process, but with a standard suitable for withholding or CAT claims. *See* 83 Fed. Reg. at 55942; 8 C.F.R. § 208.31.

In full removal proceedings, an alien may raise any claim for relief or protection from removal, including asylum, withholding, and CAT protection. 8 U.S.C. §§ 1158(a)(1), 1231(b)(3)(A); 8 C.F.R. § 1208.16(b), (c). If the alien is denied relief or protection on any ground, he may seek judicial review of that determination, after exhausting administrative remedies in the immigration courts and the Board of Immigration Appeals (BIA), in the federal courts of appeals. *See* 8 U.S.C. § 1252(a)(5), (b)(9), (d). In those proceedings, the federal courts of appeal have exclusive jurisdiction to address any "constitutional claims or questions of law," *id.* § 1252(a)(2)(D), and any "questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States." *Id.* § 1252(b)(9).

Joint Rule/Presidential Proclamation. On November 9, 2018, the Attorney General and Secretary issued a joint interim final rule rendering ineligible for asylum aliens who enter the United States in contravention of a Presidential proclamation that, under 8 U.S.C. §§ 1182(f) and 1185(a), limits or suspends the entry of aliens into the United States through the southern border with Mexico. 83 Fed. Reg. 55934; 8 C.F.R. § 208.13(f). To impose that bar, the Attorney General and Secretary invoked their statutory authority to establish "additional limitations . . . under which an alien shall be ineligible for asylum" (8 U.S.C. § 1158(b)(2)(C)), and to impose "limitations on the consideration of an application for asylum" (*id.* § 1158(d)(5)(B)). *See* 83 Fed. Reg. at 55934-38. The rule explains that an "alien whose entry is suspended or limited by a proclamation is one whom the President has determined should not enter the United States" and that "[s]uch an alien would have engaged in actions that undermine a particularized determination in a proclamation that the President judged as being required by the national interest." *Id.* at 55934. That determination reflects "sensitive determinations regarding foreign relations and national security that Congress has entrusted to the President," and "[a]liens who contravene such a measure have not merely violated the immigration laws, but have also undercut the efficacy of a measure adopted

by the President based upon his determination of the national interest in matters that could have significant implications for the foreign affairs of the United States." *Id.*

The rule also amends regulations (8 C.F.R. §§ 208.30(e)(5), 1208.30(e)(5)) to provide that an alien who contravenes a proclamation under 8 U.S.C. § 1182(f) may have an ineligibility bar applied to them during their credible-fear interview, as there is no significant possibility that the alien will be found to have a credible fear of persecution that could result in a grant of asylum. *See* 83 Fed. Reg. at 55947. Aliens who lack a credible fear due to the proclamation-based eligibility bar may still be placed in removal proceedings before an IJ if they establish a reasonable fear of persecution or torture. *Id.* at 55952-53 (8 C.F.R. § 208.30(e)(5)). Consistent with the United States' international treaty obligations, that process considers claims for withholding or CAT using the existing reasonable-fear standard, with review of a negative determination by an immigration judge, if appropriate. *Id.* at 55952-53.

The rule was issued as an interim final rule, effective immediately during the comment period under the good-cause and foreign-affairs exceptions to the notice-and-comment and effective-date requirements of the APA. *See id.* at 55949-50.

Later the same day that the rule was issued, the President issued a proclamation under 8 U.S.C. §§ 1182(f) and 1185(a) that "suspend[s] and limit[s]" "[t]he entry of any alien into the United States across the international boundary between the United States and Mexico," except for at a port of entry. *See Presidential Proclamation Addressing Mass Migration Through the Southern Border of the United States* § 1 (Proclamation) (Nov. 9, 2018), 83 Fed. Reg. 57661. The proclamation will last for 90 days after November 9 or until a safe-third-country agreement with Mexico takes effect, whichever is earlier. *Id.* §§ 2(a), (b). The proclamation does not limit any alien "from being considered" for withholding of removal or CAT protection. *Id.* § 2(c).

Together, the proclamation and rule address the "continuing and threatened mass migration of aliens with no basis for admission into the United States through our southern border" and the need "to maintain the effectiveness of the asylum system for legitimate asylum seekers. *Id.* (preamble). The President observed that "approximately 2,000 inadmissible aliens have entered each day at our southern border" in recent weeks, and that a "substantial number of aliens primarily

from Central America . . . are traveling in large, organized groups through Mexico and reportedly intend to enter the United States unlawfully or without proper documentation." *Id.* The proclamation explains that the "entry of large numbers of aliens into the United States unlawfully between ports of entry on the southern border is contrary to the national interest" and that such "[u]nlawful entry puts lives of both law enforcement and aliens at risk." *Id.*

The rule likewise identifies an "urgent situation at the southern border" where there "has been a significant increase in the number and percentage of aliens who seek admission or unlawfully enter . . . and then assert an intent to apply for asylum." 83 Fed. Reg. at 55944-45 (noting a 2000% increase in credible-fear referrals since FY 2008, and that 61% of aliens from Northern Triangle countries assert a fear). The Departments explained that the rule is urgently needed to discourage aliens from crossing the border illegally, raising non-meritorious asylum claims, and securing release into the country. In FY2018, 396,579 aliens were apprehended entering unlawfully between ports of entry along the southern border. *Id.* at 55948. That is more than 1,000 aliens every day—many with children—who are making a dangerous and illegal border crossing rather than presenting at a port of entry. And the rate of aliens asserting a "credible fear" has gone up by 2000% since 2008, from "5,000 a year in [FY] 2008 to about 97,000 in FY 2018," while a large majority of these asylum claims are not meritorious. *Id.* at 55935, 55946 (of 34,158 case completions in FY2018 that began with a credible-fear claim, 71% resulted in a removal order, and asylum was granted in only 17%). Indeed, a substantial number of aliens "do not pursue their claims" once released into the United States, add to significant backlogs in the immigration court system, or "fail to appear for . . . proceedings." *Id.* (26% of the 791,821 immigration case backlog due to this process, and 31% of case completions in FY2018 were due to alien not showing up to proceedings, and in many an asylum application was never filed). The large majority of such claims ultimately lack merit. *Id.* at 55946. The statistics relating to nationals of Northern Triangle countries highlight this problem: of those establishing credible fear whose cases were resolved in FY 2018, only 54% sought asylum; only 9% received asylum; and 38% did not appear in proceedings. *Id.* The rule thus explains that discretion to grant asylum will not be exercised for those who violate such a proclamation, to "channel inadmissible aliens to ports of entry, where

such aliens could seek to enter and would be processed in an orderly and controlled manner" and would not be able to either avoid detection or abuse the asylum process. *Id.* at 55935.

Finally, the rule explained that immediate action was warranted for the swift protection of the United States' southern border, immigration officers, and the hundreds of aliens who die each year crossing the border, *see id.*, and to "encourage . . . aliens to first avail themselves of offers of asylum from Mexico." *Id.*

Other Litigation. On November 9, four organizations that provide legal and social services to immigrants and refugees filed suit challenging the rule and sought immediate injunctive relief. *See East Bay Sanctuary Covenant v. Trump*, No. 18-681, 2018 WL 6053140, at *3 (N.D. Cal. Nov. 19, 2018). Like Plaintiffs here, the *East Bay* plaintiffs alleged that the rule violates the APA because it exceeds the Executive Branch's statutory authority and was improperly promulgated without notice-and-comment rulemaking. On November 19, the district court granted a nationwide injunction barring implementation of the rule at least until a hearing on December 19, 2018. The court concluded that the rule likely conflicts with the INA, and that other considerations favored injunctive relief. *See id.* On November 30, the court denied the government's motion to stay the injunction pending appeal. Order, *East Bay*, No. 18-6810, Dkt. 61. On December 1, the government filed with the Ninth Circuit a motion to stay the district court's injunction pending appeal. That motion was denied December 7, 2018, shortly before this filing was due.[1]

This Lawsuit. Plaintiffs, six aliens who crossed the border illegally and were apprehended shortly thereafter, filed this lawsuit on November 20. Plaintiffs allege that the rule and proclamation together improperly "render ineligible for asylum any noncitizen who enters the United States without inspection from across the U.S.-Mexico border." Compl. ¶ 3.

Plaintiffs bring eight claims. First, they claim that the rule conflicts with the asylum statute and so is contrary to law under the APA. Compl. ¶¶ 4, 74-80. Second, they claim the rule conflicts with the expedited removal statute, 8 U.S.C. § 1225(b)(1)(B)(v), because that statute prohibits applying a mandatory bar to asylum at the credible-fear stage. *Id.* ¶¶ 5, 81-91. Third, they claim

[1] The panel decision, which 65 pages, and accompanied by a 5-page dissent, was issued 8.07 P.M. Eastern, the day this brief was due.

that the rule conflicts with the TVPRA requirements governing how unaccompanied minors apply for asylum. *Id.* ¶¶ 6, 92-101. Fourth, they claim that the rule is arbitrary and capricious under the APA. *Id.* ¶¶ 102-03. Fifth, they assert the rule violates the Appointments Clause and 28 U.S.C. § 508. *Id.* ¶¶ 104-12. Sixth, they claim the rule violates § 1158(b)(2)(C)'s requirement that new limitations be promulgated by regulation. *Id.* ¶¶ 113-18. Seventh, they claim the rule was improperly issued without notice and comment. *Id.* ¶¶ 119-20. Eighth, incorporating their first six counts, they allege that the rule is ultra vires. *Id.* ¶¶ 121-22.

On November 21, two days after the *East Bay* injunction was entered, Plaintiffs moved for a TRO or preliminary injunction enjoining Defendants from implementing the rule. *See* TRO Br. 19-45; Proposed Order 2. Plaintiffs argue that such relief is necessary because they are irreparably harmed by the denial of the opportunity to demonstrate that they are eligible for asylum. TRO Br. 40-42. As of this filing, none of the Plaintiffs have been subject to the rule or are likely soon to be subject to it. O.A., K.S., G.Z., D.S., and C.A. are now in full removal proceedings, where they may raise their asylum challenges. Exs. A-E, Declarations of David Strange; Ex. G, Declaration of Jennifer Rellis. And A.V. is being prosecuted for illegal entry and will not be subject to any removal procedure, including a credible-fear interview, until some indeterminate time after the prosecution concludes. Ex. F, Declaration of Dwain Holmes.

STANDARD GOVERNING MOTION FOR PRELIMINARY INJUNCTION

A TRO or preliminary injunction is "an extraordinary and drastic remedy." *Munaf v. Geren*, 553 U.S. 674, 689 (2008). A party seeking such relief "must establish that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Plaintiffs must satisfy each requirement, and the D.C. Circuit has suggested that "a likelihood of success is an independent, freestanding requirement for a preliminary injunction," and that the Court may not apply the "sliding scale approach." *Nat'l Ass'n for Fixed Annuities v. Perez*, 219 F. Supp. 3d 10, 13 (D.D.C. 2016) (Moss, J.). Regardless of "whether the sliding scale approach applies," if Plaintiffs do not show "a substantial likelihood" of jurisdiction or demonstrate that they are "likely to suffer an

irreparable injury, the Court must deny the motion." *California Ass'n of Private Postsecondary Sch. v. DeVos*, No. 17-999, 2018 WL 5017749, at *4 (D.D.C. Oct. 16, 2018) (Moss, J.).

ARGUMENT

The Court should reject Plaintiffs' request for a TRO or preliminary injunction. Nothing here warrants emergency injunctive relief. The Court lacks jurisdiction over Plaintiffs' claims under 8 U.S.C. § 1252(e)(3) and 28 U.S.C. § 1331, and they fail to establish Article III standing. Even if the Court were to reach the merits, Plaintiffs' claims fail. The rule is consistent with § 1158(a) and § 1225(b)—it represents a reasonable application of the agency's authority to implement those sections—and the rule has no bearing on procedural protections for unaccompanied alien minors under the TVPRA. The rule does not violate the Appointments Clause or Attorney General Succession Act, nor does it improperly transfer to the President the agencies' authority over asylum eligibility. And the rule was properly issued as an interim final rule under the good-cause and foreign-affairs exceptions. Finally, equitable factors support denying emergency relief, especially given Plaintiffs' lack of irreparable injury.

I. Plaintiffs' Claims Are Not Justiciable.

Plaintiffs fail to carry their burden of establishing that this Court has subject-matter jurisdiction to hear their claims and that they have standing to raise them. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Plaintiffs invoke 8 U.S.C. § 1252(e)(3), Compl. ¶¶ 26-27, but none of the Plaintiffs have been subject to the challenged credible fear procedures, so § 1252(e)(3) cannot supply jurisdiction. Plaintiffs also invoke 28 U.S.C. § 1331, Compl. ¶¶ 26-27, but the INA forecloses jurisdiction under § 1331 for these claims. And even if this Court had statutory jurisdiction, Plaintiffs would still lack standing to assert their claims, because the challenged rule has not been applied to them and they cannot show any possibility of imminent injury.

A. The Court Lacks Subject-Matter Jurisdiction Over Plaintiffs' Claims

1. The Court lacks jurisdiction under 8 U.S.C. § 1252(e)(3)

Plaintiffs assert that jurisdiction is proper under § 1252(e)(3) because their suit challenges the "validity of the [expedited removal] system." Compl. ¶ 27. Plaintiffs are mistaken.

Section 1252(e)(3) gives this Court jurisdiction over challenges to written policies, procedure, or guidance "implement[ing]" the expedited removal system (8 U.S.C. § 1225(b)), but only when such a challenge is brought by a person who is subject to expedited removal "determinations under section 1225(b)." 8 U.S.C. § 1252(e)(3)(A). Here, five of the six Plaintiffs—O.A., K.S., G.Z., D.S., and C.A.—have not received any "determination under 1225(b)." *Id.*; *see* Exs A-E. They are not in expedited removal proceedings but instead were issued notices to appear before an IJ for full removal proceedings under 8 U.S.C. § 1229a. And because they are not subject to expedited removal proceedings, any change to credible-fear processing imposed by the rule has had no impact on these five Plaintiffs. Accordingly, they may not invoke § 1252(e)(3) to challenge the validity of the rule (or proclamation) as applied to the expedited removal system. *See Am. Immigration Lawyers Ass'n v. Reno (AILA)*, 199 F.3d 1352, 1360 (D.C. Cir. 2000) (§ 1252(e)(3) "meant to allow litigation challenging the . . . [expedited removal] system by, and only by, aliens against whom the [expedited removal] procedures had been applied").

The remaining Plaintiff, A.V., remains potentially subject to expedited removal procedures, but the Court lacks jurisdiction as to her because the challenged regulations have not yet been applied to her, and may never be. At most, the rule implements § 1225(b), in a very limited fashion, by amending 8 C.F.R. §§ 208.30(e)(5) and 1208.30(e) to permit asylum officers and immigration judges to deny credible fear based on a mandatory ineligibility bar based on a Presidential proclamation. But A.V. may not invoke § 1252(e)(3) because the regulatory provisions the rule changed have not "been applied" to her. *AILA*, 199 F.3d at 1360. Indeed, A.V. is currently subject to criminal prosecution for illegal entry, and at this time it is speculative when, if ever, she will have a credible-fear interview, let alone one in which the rule applies. Ex. F.

2. The Court lacks jurisdiction under 28 U.S.C. § 1331

The INA also precludes jurisdiction under 28 U.S.C. § 1331.

First, the INA precludes district-court jurisdiction over five Plaintiffs' (all but A.V.'s) claims because they have been served notices to appear for full removal proceedings under § 1229a, Exs. A-E, G, and are thus subject to the related review-channeling provisions that

provides judicial review in federal courts of appeals—not district court. The INA provides that "notwithstanding any other provision of law," its review provisions shall govern all removal-related claims. 8 U.S.C. § 1252(a)(5), (b)(9). Under § 1252(a)(5), "a petition for review filed with an appropriate court of appeals . . . shall be the sole and exclusive means for judicial review of an order of removal." 8 U.S.C. § 1252(a)(5). And § 1252(b)(9) consolidates "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien" into "judicial review of a final order." *Id.* § 1252(b)(9). These provisions channel all issues arising from removal proceedings or that can be raised in those proceedings (conducted in the administrative immigration courts and the Board of Immigration Appeals) into a petition for review that must be filed with a federal court of appeals, and only after a removal order becomes final. *See J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031, 1033-34 (9th Cir. 2016) ("Taken together, § 1252(a)(5) and § 1252(b)(9) mean that *any* issue—whether legal or factual—arising from *any* removal-related activity can be reviewed *only* through the [petition-for-review] process."); *Aguilar v. ICE*, 510 F.3d 1, 9 (1st Cir. 2007) (similar); *Vetcher v. Sessions*, 316 F. Supp. 3d 70, 76 (D.D.C. 2018) (Boasberg, J.) (similar).

These provisions foreclose these five Plaintiffs' efforts to sidestep administrative proceedings. Any asylum or protection from removal request they make must be raised in those proceedings. *J.E.F.M.*, 837 F.3d at 1031; 8 C.F.R. § 208.2(b) (once notice to appear is issued, asylum requests must be adjudicated in those proceedings). Because Plaintiffs must assert their asylum (and protection) claims in their removal proceedings, legal challenges concerning their ability to seek asylum are necessarily "inextricably intertwined" with their removal proceedings. *Id.* at 1033; *see also Vetcher*, 316 F. Supp. 3d at 77. Plaintiffs' challenge would be especially premature, and contrary to Congress's calibrated review scheme, because Plaintiffs are asking this Court to review policies affecting their eligibility for asylum before an immigration court has even had a chance to evaluate Plaintiffs' requests for asylum, let alone to apply the challenged policies to Plaintiffs. *See J.E.F.M.*, 837 F.3d at 1033. Indeed, the question whether Plaintiffs should be granted asylum or protection from removal will likely be a question in their removal proceedings,

and the relief they seek in this Court may well be granted in that process. *See Delgado v. Quarantillo*, 643 F.3d 52, 54 (2d Cir. 2011) (no jurisdiction over claims where relief requested effectively "render[s] the [removal] order" that may ultimately issue "invalid"). Deciding any future asylum claim by these Plaintiffs—a request for relief from removal—thus necessarily presents questions "arising from" their removal proceedings, barring district-court review of their asylum-related challenges. 8 U.S.C. § 1252(b)(9). If Plaintiffs are denied asylum in removal proceedings (whether under the new bar to eligibility if the rule is able to operate, or because they are found to not otherwise be eligible under existing law) they may then challenge that decision before the BIA. And any final removal order entered against a Plaintiff may then be challenged in the appropriate court of appeals, where Plaintiffs may raise any constitutional or legal question arising from those proceedings. *See id.* § 1252(a)(2)(D). Plaintiffs cannot bypass the immigration courts and administrative process that they are required to exhaust before proceeding to federal court. *See J.E.F.M.*, 837 F.3d at 1033; *Aguilar*, 510 F.3d at 9; *Vetcher*, 316 F. Supp. 3d at 77.[2]

Second, as to A.V., § 1252(e)(3) by its terms is the sole basis for jurisdiction for purposes of any challenge to the expedited removal system, including changes to credible fear processing—if those rules are ever even applied to her. *See* 8 U.S.C. §§ 1252(e)(1)(A) ("Without regard to the nature of the action or claim . . . no court may enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) . . . except as specifically authorized in a subsequent paragraph of this subsection . . . ."), 1252(e)(3)(A) (providing the exclusive means for judicial review of determinations under

[2] To the extent that Plaintiffs suggest that § 1252(b)(9) does not apply to their Appointments Clause claim, they are mistaken. Challenges to the constitutionality of the rule and its application in Plaintiffs' removal proceedings "are inextricably intertwined with the conduct of the very enforcement proceeding the statute grants the [agency] the power to institute and resolve as an initial matter" and, thus, under § 1252, Plaintiffs must "wait to raise their arguments about the proceeding's deficiencies before a Court of Appeals should the [agency] issue orders adverse to them." *Jarkesy v. SEC*, 803 F.3d 9, 14, 23 (D.C. Cir. 2015) (adopting the district court's holding in 48 F. Supp. 3d 32, 38 (D.D.C. 2014) (internal quotation marks omitted)). Indeed, the Second and Eleventh Circuits have rejected district-court jurisdiction over Appointments Clause challenges in the face of review-channeling statutes similar to § 1252. *See Tilton v. SEC*, 824 F.3d 276, 279, 286 (2d Cir. 2016); *Hill v. SEC*, 825 F.3d 1236, 1251-52 (11th Cir. 2016).

§ 1225(b)). Thus, because Plaintiff A.V. is in expedited removal proceedings, *see* Ex. F, she cannot invoke 28 U.S.C. § 1331 as a basis for jurisdiction for any of her claims.

B. Plaintiffs Lack Article III Standing.

Plaintiffs' suit also fails on Article III grounds: No Plaintiff can establish any injury attributable to the rule because it has not been applied to Plaintiffs. Plaintiffs "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006). "[A] plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017). Plaintiffs do not have standing to challenge the rule or proclamation "apart from any concrete application that threatens imminent harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009).

Plaintiffs cannot identify any injury from application of the rule or proclamation. The rule was enjoined by a different court and therefore has not been applied to Plaintiffs. And even without that injunction, no Plaintiff has proceeded to a credible-fear interview with USCIS where application of the rule could occur to determine whether the individual is subject to the proclamation and is thus ineligible for asylum. Instead, five Plaintiffs were released and issued notices to appear for ordinary removal proceedings under 8 U.S.C. § 1229a, and one Plaintiff will be subject to ordinary expedited removal proceedings under 8 U.S.C. § 1225(b), but only after her criminal prosecution concludes. Nothing currently prevents Plaintiffs from seeking asylum in their removal or expedited removal proceedings. And so long as the rule has been enjoined nationwide, Plaintiffs will necessarily be subject to pre-existing asylum procedures. It is therefore speculative whether the challenged rule and proclamation, if enforced, would injure these Plaintiffs in any imminent way, let alone that such injury is "certainly impending." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). The rule and proclamation have no present effect on them and it is speculative whether, if the injunction in California were stayed, they would have any effect on Plaintiffs' future administrative proceedings.

II. The Rule and Proclamation Are Consistent with the INA

Plaintiffs argue that the rule and proclamation violate the INA by making certain unlawful entrants ineligible to receive asylum. TRO Br. 20-29. Not so. The rule and proclamation fall within the Executive Branch's authority to regulate the entry of aliens and grant or deny asylum.

A. Plaintiffs Lack a Cause of Action under the APA

At the threshold, Plaintiffs' APA claims fail. The APA allows an individual to seek judicial review when he is "adversely affected or aggrieved by agency action." 5 U.S.C. § 702. Section 702 does not apply, however, "to the extent that . . . statutes preclude judicial review." *Id.* § 701(a)(1). As explained, that is the case here. *See* 8 U.S.C. §§ 1252(a)(5), (b)(9), (e)(3). And even if § 1252 did not foreclose judicial review of Plaintiffs' APA claims, APA review still would be unavailable. The APA provides for review only of "final agency action." 5 U.S.C. § 704. The President's proclamation is not "agency action" at all, *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992), and as to the rule, there has been no final decision denying asylum based on application of the rule to any Plaintiff, so each Plaintiff lacks final agency action as applied to them, given that removal proceedings are still pending. *See Rochester Tel. Corp. v. United States*, 307 U.S. 125, 130 (1939); *Jama v. DHS*, 760 F.3d 490, 497 (6th Cir. 2014) ("once the agency has made a final decision on [plaintiff's] immigration status, i.e., at the conclusion of removal proceedings and following appeal to the BIA, then [he] may seek review"). As we have explained, Plaintiffs would have the opportunity to seek that relief in their full removal proceedings or, for A.V., through a § 1252(e)(3) action if and when the rule is in fact applied to her in expedited removal proceedings.

B. The Rule Is Consistent with the INA

The rule is consistent with the text of § 1158(a) and § 1225(b). It is also a reasonable and supported exercise of the agencies' authority under those sections. Finally, it has no impact on procedural protections for unaccompanied alien children under the TVPRA.

1. The Rule Is Consistent with 8 U.S.C. § 1158

Plaintiffs contend that the rule unlawfully renders aliens ineligible for asylum based on the manner of their entry. That argument fails for two independent reasons. First, § 1158(a) does not

preclude the Executive Branch from disqualifying aliens from asylum eligibility based on the manner of their entry. And second, the rule is not predicated upon an alien's unlawful entry per se, but upon the alien's contravention of a Presidential proclamation reflecting foreign policy judgments to address a crisis at the southern border.

First, § 1158(b)(1) makes a grant of asylum a matter of the Executive's discretion, and § 1158(b)(2)(C) authorizes the agency heads to "establish *additional* limitations and conditions . . . under which an alien shall be ineligible for asylum" on top of the six statutory bars on asylum eligibility set forth in § 1158(b)(2)(A). 8 U.S.C § 1158(b)(2)(C) (emphasis added). To be sure, that broad delegation of authority requires that regulatory asylum-eligibility bars be "consistent with" § 1158. *Id.* § 1158(b)(2)(C). But that describes the rule here: Nothing in § 1158 confers *a right* to a grant of asylum for aliens who enter in violation of a specific Presidential proclamation governing a specific border for a specific time in response to a specific crisis, and thus the rule is "consistent with" the broad discretion conferred by that section to impose an asylum-eligibility bar tailored to these circumstances.

Against this straightforward analysis, Plaintiffs contend (TRO Br. 20) that the rule conflicts with § 1158(a), which provides that "[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival . . .), irrespective of such alien's status, may apply for asylum in accordance with this section." 8 U.S.C. § 1158(a)(1). But the instruction that aliens "may apply" for asylum regardless of whether they entered at a port of entry does not require, as Plaintiffs maintain, that an alien must be eligible for or be able to "receive" asylum. TRO Br. 21. Rather, § 1158 carefully distinguishes between an alien's ability *to apply* for asylum and the Executive's authority *to deny* asylum on discretionary grounds of ineligibility, imposing different sets of requirements for each stage of the process.

Section 1158(a), which governs asylum applications, bars an alien from even applying for asylum unless: (1) he "demonstrates by clear and convincing evidence that the application has been filed within 1 year after" his arrival, 8 U.S.C. § 1158(a)(2)(B); (2) he has not "previously applied for asylum and had such application denied," *id.* § 1158(a)(2)(C); and (3) the Attorney General has not "determine[d] that the alien may be removed" under a safe-third-country

agreement, *id.* § 1158(a)(2)(A). An alien must clear these hurdles before his eligibility for asylum may even be submitted, but if he does so he "may apply for asylum" under § 1158(a)(1) "whether or not" he arrived "at a designated port of arrival." But even if § 1158(a) does not bar an alien from applying for asylum, he still may be categorically ineligible for asylum under six statutory eligibility bars, *id.* § 1158(b)(2)(A), or any "additional limitations" the agency heads may impose, *id.* § 1158(b)(2)(C). And even if an alien does not fall within one of these statutory or regulatory eligibility bars, the ultimate "decision whether asylum should be granted to an eligible alien is committed to the Attorney General's [and Secretary's] discretion." *INS v. Aguirre-Aguirre*, 526 U.S. 415, 420 (1999). Under § 1158, the Attorney General or Secretary "*may* grant asylum to an alien who has applied for asylum" if they "determine[e] that such an alien is a refugee" under the INA. 8 U.S.C. § 1158(b)(1)(A) (emphasis added). Section 1158 imposes no express constraints on the Executive's discretion *to deny* asylum to an applicant, and thus the asylum bar imposed by the rule here is not inconsistent with § 1158. To the contrary, § 1158 primarily limits the Executive's discretion *to grant* asylum, by imposing six statutory eligibility bars, each of which renders an alien categorically ineligible for this relief regardless of his ability to apply for asylum.[3]

It therefore is not the case, as Plaintiffs claim in reliance on *East Bay*, that "to say that one may apply for something that one has no right to receive is to render the right to apply a dead letter." TRO Br. 20-21. Under Plaintiffs' theory, by providing that aliens could *apply* for asylum regardless of their manner of entry into the United States, Congress mandated that aliens could never be *denied* asylum based on manner of entry. But courts and the Board of Immigration Appeals have held that Congress permitted just that. *See, e.g.*, *Komarenko v. INS*, 35 F.3d 432, 436 (9th Cir. 1994); *Matter of Pula*, 19 I. & N. Dec. 467 (BIA 1987). For example, "[f]raud in the application is not mentioned explicitly, but is one of the 'additional limitations under which an alien shall be ineligible for asylum' that the Attorney General is authorized to establish by

[3] Those bars apply if the alien (1) engaged in certain forms of "persecution" before arriving, (2) was convicted of a "particularly serious crime," including any "aggravated felony," (3) "committed a serious nonpolitical crime outside the United States prior to arrival," (4) poses "a danger to the security of the United States," (5) falls within certain categories relating to "terrorist activity," or (6) "has firmly resettled in another country prior to arriv[al]." 8 U.S.C. § 1158(b)(2).

regulation,'" *Nijjar v. Holder*, 689 F.3d 1077, 1082 (9th Cir. 2012), even though that regulation would "render the right to apply a dead letter." And many aliens are categorically ineligible for asylum under § 1158(b)(2), yet are still entitled to apply for asylum under § 1158(a) even if their applications are a "dead letter." Plaintiffs' reading of the statutory provisions renders them "meaningless, disabling the Attorney General from adopting further limitations while the statute clearly empowers him to do so." *R-S-C- v. Sessions*, 869 F.3d 1176, 1187 n.9 (10th Cir. 2017); *cf. Hawaii*, 138 S. Ct. at 2411 (rejecting argument that § 1152(a)(1)(A)'s prohibition on nationality discrimination in *issuance of immigrant visas* constrained President's separate authority to *suspend entry* under § 1182(f)).

Plaintiffs acknowledge that the agencies have, for decades, denied asylum as a matter of discretion based on the alien's "manner of entry." TRO Br. 20. As the Board has explained, "[a] careful reading of the language of [§ 1158(a)(1)] reveals that the phrase 'irrespective of such alien's status' modifies only the word 'alien' in the first clause of the sentence." *Matter of Pula*, 19 I. & N. Dec. at 473. "The function of that phrase is to ensure that the procedure established by the Attorney General for asylum applications includes provisions for adjudicating applications from *any* alien present in the United States or at a land or port of entry, 'irrespective of such alien's status.'" *Id.* (collecting cases). Thus, Congress made clear that aliens like stowaways, who, at the time the Refugee Act was passed, could not avail themselves of our immigration laws, would be eligible at least to apply for asylum "irrespective of [their] status." *See id.* (citing *Yiu Sing Chun v. Sava*, 708 F.2d 869, 874 (2d Cir. 1983)) and 8 U.S.C. § 1158(a)). "The phrase does not apply to the second clause of the sentence, which is independent and separate from the first clause," and "contains authorization for the Attorney General to grant asylum applications at his discretion." *Id.* "Thus, while section [§ 1158](a) provides that an asylum application be accepted from an alien 'irrespective of such alien's status,' no language in that section precludes the consideration of the alien's status in granting or denying the application in the exercise of discretion." *Id.* at 467.

Plaintiffs' position thus reduces to the theory that while an alien could be denied asylum on a case-by-case discretionary basis due to his manner of entry or attempted entry, the government cannot categorically deny eligibility for asylum simply because an applicant entered between ports.

TRO Br. 20 (citing *Pula*, 19 I. & N. Dec. at 474). But that theory does not withstand scrutiny. First, *Pula*, the only authority that Plaintiffs invoke for this assertion, merely set forth parameters for deciding whether an alien otherwise eligible for asylum should receive it as a discretionary matter, and decided that such discretion should be exercised based on a multifactor totality-of-the-circumstances approach, not a per se rule treating the manner of entry as disqualifying. 19 I. & N. Dec. at 473. Indeed, as noted above, the BIA concluded that § 1158(a) did not bar the categorical exercise of discretion to deny an alien asylum based on his manner of entry, which was the rule in the years prior to *Pula*. *See Matter of Salim*, 18 I. & N. Dec. 311 315-16(BIA 1982) (according manner of entry dispositive weight); *Singh v. Nelson*, 623 F. Supp. 545, 556 (S.D.N.Y. 1985) ("the Service is attempting to discourage people from entering the United States without permission and serves notice that aliens will not be able to circumvent the procedures governing lawful immigration to this country. This goal provides a rational basis for distinguishing among categories of illegal aliens."). Rather, the BIA in *Pula* just chose, as a policy matter, to weigh a broader set of factors when exercising discretion to grant or deny asylum claims. *Pula* in no way held that a categorical bar rendering an alien ineligible for asylum based on his manner of entry would violate the INA, and indeed pre-dated the enactment of § 1158(b)(2)(C), which expressly authorized the Attorney General to establish additional eligibility bars "by regulation"—i.e., not on a case-by-case basis. The relevance of *Pula* is that the BIA has properly treated illegal entry as a discretionary factor to consider in the context of individualized asylum adjudications for many years. But nothing in § 1158 forbids the Executive from adopting a categorical eligibility bar—particularly given the public-safety and foreign-policy problems posed by this specific subset of illegal entrants. In fact, under *Pula*, consideration of illegal entry will at least sometimes tip the scales against asylum—yet Plaintiffs can provide no explanation how that result is "consistent" with § 1158(a) but the rule here is not. If § 1158(a) does not prohibit the agency from considering manner of entry on a case-by-case basis when determining whether to grant asylum under § 1158(b), there is no textual basis to conclude that it prohibits the agency from considering manner of entry categorically under the express authority to create categorical bars. *See, e.g.*, *Lopez v. Davis*, 531 U.S. 230, 243-244 (2001) (rejecting the argument that the Bureau of Prisons

was required to make "case-by-case assessments" of eligibility for sentence reductions and explaining that an agency "is not required continually to revisit 'issues that may be established fairly and efficiently in a single rulemaking'"). The simple fact is that § 1158(a)'s rules governing *an alien's right to apply for asylum* simply do not speak to § 1158(b)'s rules governing *the Executive's discretion to deny asylum*, whether through categorical eligibility bars or through relying on particular considerations in individualized asylum adjudications. *See Pula*, 19 I. & N. Dec. 467.

Moreover, "[u]nder the INA, the term 'discretion' does not supplant [the] general grant of permission for rulemaking," and "'discretion' under section 1158(a) may be exercised by rules giving fixed weight to a particular factor." *Yang v. I.N.S.*, 79 F.3d 932, 936 -37(9th Cir. 1996); *accord Mak v. INS*, 435 F.2d 728, 730 (2d Cir. 1970) (Friendly, J.) ("The legislature's grant of discretion to accord a privilege does not imply a mandate that this must inevitably be done by examining each case rather than by identifying groups. The administrator also exercises the discretion accorded him when, after appropriate deliberation, he determines certain conduct to be so inimical to the statutory scheme that all persons who have engaged in it shall be ineligible for favorable consideration"); *Midtec Paper Corp. v. United States*, 857 F.2d 1487, 1501 (D.C. Cir. 1988) (holding, in reliance on *Mak*, that agency need not "exercise its statutory discretion anew in each particular case"). Indeed, the Ninth Circuit has already recognized that the asylum statute is a "broad delegation of power" that permits creation of regulatory bars to eligibility that are categorical, and thus has rejected the claim that "Congress intended there to be no categories of aliens for whom asylum would be completely unavailable," because "Congress did not expressly declare such an intent in 8 U.S.C. § 1158(a)." *Komarenko*, 35 F.3d at 436. Rather, "[t]he statute merely states that 'the alien may be granted asylum in the discretion of the Attorney General,'" *id.* (quoting 8 U.S.C. § 1158(a)(1) (1993)), and thus nothing in the statute "preclude[s] the Attorney General from exercising this discretion by promulgating reasonable regulations applicable to . . . undesirable classes of aliens." *Id*. Although the statute has since been amended, the relevant discretionary features are undiminished, *see* 8 U.S.C. § 1158(a)(1), (b)(1)(A), and Congress

accepted this reasoning by expressly conferring discretionary authority to adopt additional categorical bars on asylum eligibility. *Id.* § 1158(b)(2)(C).

Second, and in any event, the rule is not predicated upon the manner of an alien's entry per se, but upon whether an alien has contravened a Presidential proclamation concerning the southern border. Plaintiffs' fears that recognizing the Executive's broad authority over asylum will render § 1158(a)(1) "a dead letter" (TRO Br. 21) are thus particularly unwarranted. The rule will "not preclude an alien physically present in the United States from being granted asylum if the alien arrives in the United States through any border other than the southern land border with Mexico or at any time other than during the pendency of a proclamation suspending or limiting entry." 83 Fed. Reg. at 55941. The only category of aliens who are ineligible are those who are "subject" to a proclamation concerning the southern border and "nonetheless enter[] the United States after [that] proclamation [went] into effect," and have thus necessarily "engaged in actions that undermine a particularized determination in a proclamation that the President judged as being required by the national interest." *Id.* at 55940. The President's proclamation is a response to a particular and "immediate" "crisis"; it is "tailor[ed] . . . to channel" particular aliens "to ports of entry" to ensure that any entry will occur in "an orderly and controlled manner"; and it is a "foreign affairs" measure to "facilitate ongoing negotiations with Mexico and other countries regarding appropriate cooperative arrangements to prevent unlawful mass migration to the United States through the southern border." Proclamation (preamble). Nothing in § 1158 bars the adoption of an asylum-ineligibility rule that turns on the contravention of such a proclamation. After all, "[a]liens who contravene such a measure have not merely violated the immigration laws, but have also undercut the efficacy of a measure adopted by the President based upon his determination of the national interest in matters that could have significant implications for the foreign affairs of the United States." 83 Fed. Reg. at 55940. And aliens subject to the proclamation are differently situated than mere illegal entrants: the President has instructed his Cabinet secretaries to "consult with the Government of Mexico" and "to address the approach of large groups of aliens traveling through Mexico with the intent of entering the United States unlawfully, including efforts to deter,

dissuade, and return such aliens before they physically enter United States territory through the southern border." Proclamation § 3.

Plaintiffs, invoking the *Charming Betsy* canon, suggest that § 1158(a)(1) must be construed not to permit the rule, in light of Article 31 of 1967 United Nations Protocol Relating to the Status of Refugees, which states that signatories "shall not impose penalties [on refugees], on account of their illegal entry or presence." TRO Br. 25-27. Plaintiffs are wrong. To start, a penalty under Article 31(1) is prohibited only for those refugees "who, coming *directly from a territory where their life or freedom was threatened*," and Plaintiffs, all natives and citizens of Honduras whose putative claims are based on acts that occurred or are feared in Honduras, are *not* coming directly from such a territory. So as applied to Plaintiffs, the rule does not implicate Article 31(1) at all. *See*, *e.g.*, *United States v. Malenge*, 472 F. Supp. 2d 269, 273 (N.D.N.Y. 2007). In any event, the rule is consistent with that provision of the Protocol—which "does not have the force of law in American courts," *Khan v. Holder*, 584 F.3d 773, 783 (9th Cir. 2009)—because the bar is predicated upon contravention of a Presidential proclamation, not illegal entry per se, and aliens subject to the bar may still seek withholding of removal and CAT protection, which are the treaty obligations that the United States has implemented in domestic law. *Cazun v. Att'y Gen.*, 856 F.3d 249, 257 n.16 (3d Cir. 2017). Regardless, the government does not penalize an alien by denying asylum as a matter of discretion or limiting aliens to withholding and CAT protection: neither measure "imprison[s] or fine[s] aliens" as "the sort of criminal 'penalty' forbidden" by Article 31(1). *Id.*; *see Mejia v. Sessions*, 866 F.3d 573, 588 (4th Cir. 2017) (similar).[4] This is especially true where the regulation retains an alien's eligibility to seek both withholding of removal and protection under the CAT. *See*, *e.g.*, *Mejia*, 866 F.3d at 588; *Cazun*, 856 F.3d at 257.

Plaintiffs also appeal to legislative history, arguing that nothing in that history "support[s] the conclusion that Congress intended to authorize the President and executive branch officials to overturn 8 U.S.C. § 1158(a) and to bar access to asylum to all noncitizens who enter the United

[4] Plaintiffs attempt to distinguish *Cazun* and related cases because those decisions dealt with a *statutory* bar to any other "relief" sought by an alien against whom a previous removal order was reinstated. *See* TRO Br. 27 n.41. That is a distinction without a difference, as the fundamental question in those cases was whether, given ambiguity in the statute, the agency's interpretation barring relief was permissible. *See Cazun*, 856 F.3d at 259.

States without inspection." TRO Br. 28. But Plaintiffs' ignore that, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Congress ratified prior exercises of the Attorney General's authority to impose eligibility bars while also providing him with the specific statutory authority to issue additional limitations. Indeed, prior to 1996, all bars to asylum eligibility were regulatory, *see* Refugee and Asylum Procedures, 45 Fed. Reg. 37392, 37394-95 (June 2, 1980); *see also* Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. 30674, 30683 (July 27, 1990), and had been enacted pursuant to the Attorney General's broad statutory authority to grant asylum in his discretion. *See* 8 U.S.C. § 1158(a) (1980) ("the alien may be granted asylum in the discretion of the Attorney General"); *id.* § 1158(c)(1) (1980) ("the Attorney General may, in the Attorney General's discretion and pursuant to such regulations as the Attorney General may prescribe, admit any refugee . . ."). In 1996, Congress undertook a comprehensive reform of the asylum system, including the addition of the mandatory bars to applying for relief, *see* 8 U.S.C. § 1158(a)(2), because of its view that "[t]he asylum system has been abused by those who seek to use it as a means of 'backdoor' immigration." H.R. Rep. No. 104-469(I), at 107 (1996). As part of this overhaul, Congress noted that its "asylum legislation should codify the best features of the administrative reforms of the asylum process," H.R. Rep. No. 469, at 140, which at that time included the Attorney General's regulatory bars to asylum eligibility and the authority to issue additional bars. By statutorily enacting those provisions, Congress endorsed those bars, while simultaneously providing the agencies with explicit authority to promulgate additional conditions and limitations on asylum eligibility. That enactment was designed to prevent exactly the type of challenge that Plaintiffs raise here: these statutory enactments, including the delegation to the Attorney General to promulgate additional conditions and limitations, were meant to "clarify the firm Congressional support for asylum reform and prevent court challenges to the administrative reforms on the grounds that they have not been authorized by Congress." H.R. Rep. No. 469, at 140. Congress left no doubt in 1996 that it approved of how the Attorney General had addressed eligibility issues through regulatory bars, and that it envisioned the Attorney General doing the same going forward under the explicit delegation at § 1158(b)(2)(C).

Plaintiffs finally appeal to *Chevron* to argue that where "a rule is inconsistent with the statute it purports to implement, the statute controls." TRO Br. 28. But this is a repackaging of their contention that the regulation conflicts with § 1158(a)—which is incorrect, as explained. Plaintiffs argument that ambiguity be resolved in favor of *their* is also directly contrary to *Chevron*: where a statute is ambiguous, the agency's interpretation controls so long as it reflects "a permissible construction of the statute." *Aguirre-Aguirre*, 526 U.S. at 424. The rule in this case was promulgated pursuant to explicit statutory authority and is otherwise not in conflict with any provision of the INA. If there is ambiguity, it mandates deference to the regulation.

2. The Rule Is Consistent with 8 U.S.C. § 1225(b)(1)(B)(ii)

Plaintiffs contend the rule is inconsistent with 8 U.S.C. § 1225(b)(1)(B)(ii) because, in instructing asylum officers to enter a negative credible-fear finding for those who are barred from establishing eligibility for asylum, the rule "deprives Plaintiffs of the ability to avail themselves of a credible fear interview" guaranteed under that provision. TRO Br. 21-22. They are mistaken.

The statutory text shows why. Section 1225(b)(1)(B)(ii) provides that "[i]f the [asylum] officer determines at the time of the interview that an alien has a credible fear of persecution (within the meaning of [8 U.S.C. § 1225(b)(1)(B)](v)), the alien shall be detained for further consideration of the application for asylum." 8 U.S.C. § 1225(b)(1)(B)(ii). The definition, in turn, says that "credible fear" means "a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could *establish eligibility for asylum* under section 1158." *Id.* § 1225(b)(1)(B)](v) (emphasis added). Thus, the statute specifically provides for the asylum officer to consider asylum eligibility, and Plaintiff's statutory argument fails.

Plaintiffs point to 8 C.F.R. § 208.30(e)(5) to argue that an alien may be found to have a credible fear even where a bar to eligibility may apply. TRO Br. 21-22. To be sure, the regulation did provide that "if an alien is able to establish a credible fear of persecution or torture but appears to be subject to one or more of the mandatory bars to applying for, or being granted," including bars erected by pursuant to § 1158(b)(2), the immigration officer "shall nonetheless place the alien in proceedings under section 240." 8 C.F.R. § 208.30(e)(5). But the rule here amended that

regulation for aliens subject to an entry suspension, and (as explained) the statute explicitly provides for eligibility to be considered as part of the credible-fear process.

Plaintiffs are also wrong in suggesting that the amendment of 8 C.F.R. §§ 208.30(e)(5) and 1208.30(e)(5) in the context of aliens subject to an entry suspension at the southern border is unreasonable. TRO Br. 21-22. The INA delegates to the Attorney General and Secretary broad authority to promulgate regulations implementing the expedited removal system, including credible-fear procedures. 8 U.S.C. §§ 1103(a)(3), 1103(g), 1158(d)(5)(B , 1225(b).[5] The Secretary's decision to modify §§ 208.30(e)(5) and 1208.30(e)(5) under these authorities in this limited circumstance is reasonable. First, while the regulation provides that most aliens subject to an asylum eligibility bar but who nevertheless establish a credible fear are placed into removal proceedings under § 1229a, nothing in the statute prevents the Secretary from changing these regulations as they apply to aliens subject to an entry suspension to allow that specific bar to be considered at the credible-fear stage.[6] And second, the Secretary and the Attorney General provided reasoned justifications for changing the credible-fear process. The rule would "help ameliorate the pressures on the present system" by permitting the prompt determination of whether the alien is subject to the proclamation eligibility bar without requiring full removal proceedings and thereby "reduce the number of cases referred to section 240 proceedings." 83 Fed. Reg. 55947. Further, full removal proceedings are unnecessary when this eligibility bar applies because

[5] These authorities have been invoked to create and make changes to screening procedures on multiple occasions. *See* Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478 (Feb. 19, 1999); Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 13881 (Mar. 23, 1999); Asylum Procedures, 65 Fed. Reg. 76121 (Dec. 6, 2000); Implementation of the Agreement Between the Government of the United States of America and the Government of Canada Regarding Asylum Claims Made in Transit and at Land Border Ports-of-Entry, 69 Fed. Reg. 69480 (Nov. 29, 2004); Application of Immigration Regulations to the Commonwealth of the Northern Mariana Islands, 74 Fed. Reg. 55726 (Oct. 28, 2009).

[6] Indeed, the same regulation provides for a pre-screening for those subject to a bar to applying for asylum at § 1158(a)(2)(A) for aliens who are subject to a safe-third-country agreement. 8 C.F.R. § 208.30(e)(6). Under that provision, aliens subject to such an agreement with Canada are screened before a credible-fear determination to determine whether they may apply for asylum. *Id.* Even if they would be otherwise eligible to undergo a credible-fear screening to apply for asylum, the regulation dictates that they instead be returned to Canada given their threshold ineligibility. *See id.*; *see also Bansci v. Nielsen*, 321 F. Supp. 3d 729, 735-38 (W.D. Tex. 2018).

determining "whether an alien is subject to a suspension of entry proclamation would ordinarily be straightforward." *Id*. Given that simplicity, referring such aliens to full removal proceedings is not necessary. *Id*. That explanation is more than sufficient for arbitrary-and-capricious review of any change to § 208.30(e)(5) implemented by the rule. *See Fox Television*, 556 U.S. at 513-14.

3. The Rule is Consistent with the TVPRA

Plaintiffs' claims premised on the TVPRA, TRO Br. 23-25, lack merit for the simple reason that the rule has no impact on the statutory procedural protections afforded to unaccompanied minors under the TVPRA, 8 U.S.C. § 1232. The TVPRA sets forth procedural protections for unaccompanied alien children in removal proceedings, but does not alter the substantive standards regarding asylum standards or eligibility. *See id*. Here, the proclamation makes clear that "Nothing in this proclamation shall . . . limit the statutory processes afforded to unaccompanied alien children upon entering the United States under section 279 of title 6, United States Code, and [the TVPRA]." Proclamation § 2(c). The rule, in turn, does not alter TVPRA procedures, nor does it even mention the TVPRA. Now, just as before, an unaccompanied alien child is not subject to expedited removal proceedings, and an asylum officer will have initial jurisdiction over a child's asylum claim. *See* 8 U.S.C. §§ 1158(b)(3)(C), 1232(a)(5)(D).

As reflected by Plaintiffs' failure to cite any specific part of the challenged authorities as affecting unaccompanied alien children, *see* TRO. Br. 23-25, Plaintiffs have no basis for objecting under the TVPRA. Instead, Plaintiffs claim that unaccompanied alien children will be deprived of an opportunity to present claims in the first instance in a non-adversarial setting because they "will proceed immediately to the adversarial immigration court proceedings." *Id.* at 25. This is incorrect. USCIS asylum officers have "initial jurisdiction over any asylum application filed by" an unaccompanied child, which means that the children have an opportunity to file for asylum in a non-adversarial process through USCIS, even if the child has been issued a notice to appear in immigration court. 8 U.S.C. § 1158(b)(3)(C). Moreover, unaccompanied alien children are not subject to expedited removal. Nothing in the rule or proclamation alters this. Unaccompanied children receive the same process, including the initial non-adversarial interview, dictated by the TVPRA. There is no conflict between the TVPRA and the rule.

B. The Proclamation Is a Valid Exercise of the President's Authority

Plaintiffs also attack the rule and proclamation on the ground that the rule "give[s] the President [a] blank check" to bar future classes of aliens from asylum by issuing a proclamation suspending entry. TRO Br. 29; *see also id.* at 29-32. Plaintiffs concede that the agency heads have the authority to determine asylum eligibility and cannot reasonably dispute that the rule was issued by the agency heads. Yet they argue, purportedly based on § 1158(b)(2)(C)'s "plain language," that the rule "abdicate[s] responsibility for establishing additional limitations and conditions on asylum . . . without threat of full judicial review or the process of agency rulemaking." *Id.* at 29. Plaintiffs are again mistaken.

As Plaintiffs acknowledge, a "Presidential proclamation under § 1182(f) cannot be deemed the equivalent of a regulation in any meaningful sense." *Id*. at 30. But the rule neither purports nor attempts to equate Presidential proclamations with agency rulemaking. Instead, pursuant to express statutory authority, the agencies issued an "additional limitation[] and condition[]" for asylum eligibility—specifically, that individuals who enter the United States in contravention of a Presidential proclamation will not be eligible for asylum. This new condition, published in the Federal Register, will be subject to public comment and can be subject to judicial review on behalf of appropriate plaintiffs. So Plaintiffs' concerns have already been proven inert.

Plaintiffs assert that the "detailed statutory framework in the INA for the handling of claims" suggest that the President cannot issue a proclamation affecting a group that is not referenced in the pre-existing statutory framework. TRO Br. 31. They point to §§ 1158(b)(2)(A), (b)(2)(B)(ii), and 1225(b)(1)(B) as specifying the only grounds, means, and procedure for setting asylum policy and highlight that none involve the President. *Id.* These arguments mischaracterize what the proclamation does. The *proclamation* does not deny anyone asylum, but simply *suspends entry* for aliens between ports of entry at the southern border for a temporary period. *See* Proclamation §§ 1, 2. To be sure, the *rule* imposes an eligibility bar to asylum for those who violate the proclamation's entry suspension—but, as explained, the INA authorizes the agency heads to establish that bar, and it was both lawful and reasonable to impose such a bar on aliens who violate a Presidential proclamation. *See supra* Part III. Section 1182(f) concerns restrictions

on entry—a matter over which the President has broad authority—whereas § 1158(a) and (b) go to the separate issue of which aliens are eligible to apply for or receive asylum, which is a matter that the proclamation does not affect but the rule lawfully does. *See Hawaii*, 138 S. Ct. at 2411.

That suspension—which rests on the President's authority under § 1185(a)(1) and § 1182(f)—is lawful. *See* Proclamation § 2. The President may suspend or restrict the entry of any "aliens or of any class of aliens" if he determines such entry "would be detrimental to the interests of the United States," "for such period as he shall deem necessary," 8 U.S.C. § 1182(f), and adopt "reasonable rules, regulations, and orders" governing the "entry" or "depart[ure]" of aliens, "subject to such limitations and exceptions as [he] may prescribe," *id.* § 1185(a). The President found it in the national interest to suspend entry of these aliens and provided a detailed explanation for that determination. Proclamation (preamble). Consistent with this explanation, the proclamation imposes limited measures to ameliorate the crisis along the southern border by suspending entry for 90 days (or until a safe-third-country agreement can be reached) and only for those aliens who attempt to enter the country unlawfully on our southern border. Proclamation §§ 1, 2. That limitation on entry is consistent with the President's authority under § 1182(f) and § 1185(a)(1), which permits the President to block a class of aliens from entering, even if the entry of such aliens is already illegal. *See Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 187 (1993).

Finally, Plaintiffs contend that, because the rule contemplates future Presidential proclamations, the President would be provided the ability to govern asylum eligibility "by unilateral decree, rather than through the regulatory process as required by the statute." TRO Br. 32. This argument also misses the mark. The President's § 1182(f) authority applies solely to the discretion over entry into the United States, a core sovereign authority. Congress was aware of the authority provided to the President under § 1182(f) when it enacted the revisions to § 1158, and indeed the Supreme Court had only recently affirmed use of the President's authority to interdict aliens in a manner that prevented them from seeking asylum. *See Sale*, 509 U.S. at 187. Congress could have, but did not restrict, either or both the President's and the Attorney General's or the Secretary's discretion—here, the President's authority regarding the admissibility of persons

outside the United States and the agency heads' authority over the eligibility for asylum of persons inside the United States. All officials acted within their well-established fields of discretion, and it simply cannot be reasonably argued that the Attorney General and Secretary were not authorized to promulgate the rule on this basis.[7]

IV. The Rule Does not Violate the Appointments Clause or the Attorney General Succession Act

A. Plaintiffs' Claim is Based on a Mistaken Factual Assumption

Plaintiffs argue that the rule was issued by Acting Attorney General Whitaker, and they seek to challenge the validity of his designation. TRO Br. 32-26. That issue is not presented here, and this Court need not address it. Plaintiffs' argument rests on their assumption that DOJ submitted the rule to the Office of the Federal Register (OFR) on November 8, 2018, after Attorney General Sessions resigned. TRO Br. at 33. That assumption is incorrect.

Then-Attorney General Sessions signed the rule on November 6, 2018, and the rule was submitted to the OFR on November 6 under his authority. *See* 83 Fed. Reg. at 55953 (signed by then-Attorney General Sessions and dated November 6, 2018); Exs. H-I, Declarations of Richard Hughes and Rosemary Hart. At that point, the rule had left DOJ's hands and remained in the custody of the OFR until it was published in the Federal Register on November 9.[8] This three-day processing period is consistent with OFR's ordinary practices under the Federal Register Act; it

[7] Even if the rule were somehow open-ended or allowed the President to flesh out some precise contours later with successive proclamations, that would be lawful. Proclamations are not subject to challenge under the APA, *see Franklin*, 505 U.S. at 800-01, and the only proper challenge would be to implementation of that proclamation, not a challenge to the rule here based on speculation concerning future proclamation. *See Rajah v. Mukasey*, 544 F.3d 427, 437 (2d Cir. 2008).

[8] A rule is not final until it has been published in the Federal Register. *See, e.g.*, *Kennecott Utah Copper v. U.S. Dep't of Interior*, 88 F.3d 1191, 1206 (D.C. Cir. 1996) (upholding agency's pre-publication withdrawal of a signed draft rule); 1 C.F.R. § 18.13(a) ("A document that has been filed for public inspection with the Office of the Federal Register but not yet published, may be withdrawn from publication or corrected by the submitting agency."). So Acting Attorney General Whitaker theoretically could have intervened in the rulemaking process after Attorney General Sessions left office and before the rule was published. *See Si v. Slattery*, 864 F. Supp. 397, 404-05 (S.D.N.Y. 1994) (upholding Acting Assistant Attorney General's withdrawal of not-yet-published rule regarding certain asylum claims). But that did not happen: the rule appeared in the Federal Register on November 9, following DOJ's submission of the rule on November 6. So the relevant date for discerning the identity of the agency decisionmaker is November 6, when DOJ—under the authority of then-Attorney General Sessions—delivered the rule into OFR's custody.

has nothing to do with the identity of the agency decisionmaker who signed the rule and authorized its submission to OFR for publication. *See* 44 U.S.C. § 1506; 1 C.F.R. pt. 17 (describing the timing requirements for OFR's processing of documents for publication in the Federal Register).

Plaintiffs' support for their assertion that the rule was issued by Acting Attorney General Whitaker is a statement, pulled from the Background section of DOJ's TRO opposition in *East Bay*, that the rule was issued on November 9, 2018. TRO Br. 33. That statement was, like similar statements in this brief, simply using straightforward shorthand for the rule's publication. The *East Bay* plaintiffs had not challenged Acting Attorney General Whitaker's designation, so it was unnecessary—especially in the context of a TRO opposition—to unpack the particulars of the rule's path from agency to publication. Nothing in that filing made a substantive concession concerning the statutory and constitutional arguments Plaintiffs seek to raise in this case.

B. Defendants Incorporate by Reference the Response to the Merits of Plaintiffs' Arguments Regarding the Designation of Acting Attorney General Whitaker

Because the premise of Plaintiffs' argument is mistaken, it is unnecessary for the Court the address the lawfulness of the Acting Attorney General's designation. To the extent the Court has questions or concerns on that issue, however, Defendants respectfully refer the Court to the arguments presented in the government's response to the State of Maryland's motion for a preliminary injunction in *Maryland v. U.S. DOJ*, ECF No. 28, No. 18-cv-2849-ELH (D. Md. Dec. 4, 2018). *See also* Mem. from Steven A. Engel, Asst. Att'y Gen., to Emmett T. Flood, Counsel to the President, *Designating an Acting Attorney General*, at 2-6 (Nov. 14, 2018); *Michaels v. Whitaker*, Mem. in Resp. in Opp. to Pet. Motion to Substitute, No. 18-496 (S. Ct. 2018).

V. The Rule Was Properly Promulgated as an Interim Final Rule

Plaintiffs contend that the rule violates the APA's procedural requirements because it was issued without notice and an opportunity for comment. TRO Br. 37-40. But the APA provides exceptions to its general notice-and-comment and effect date requirements when either "the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest," 5 U.S.C. § 553(b)(B), (d)(3), or the rule "involve[s] . . . [a] foreign affairs function of the United States," *id.* § 553(a)(1). The rule here fits within both

exceptions and is consistent with similar interim rules affecting the border. As the agencies explained, there is good cause to immediately implement the rule to avoid a rush of dangerous border crossings before the rule goes into effect. *See* 83 Fed. Reg. at 55949-50. And the rule independently warrants immediate issuance because it involves foreign affairs as a critical component of ongoing negotiations with Mexico and Central American countries over border security and Mexico's shared responsibility to secure the integrity of its borders and take action to resettle refugees fleeing Central America. *Id.* at 55950.

Good Cause. The good-cause exception applies when "the very announcement of a proposed rule itself can be expected to precipitate activity by affected parties that would harm the public welfare." *Mobil Oil Corp. v. Dep't of Energy*, 728 F.2d 1477, 1492 (TECA 1983). Significant public-safety harms provide good cause to make rule changes without pre-promulgation notice and comment. *Hawaii Helicopter Operators Ass'n v. FAA,* 51 F.3d 212, 214 (9th Cir. 1995) (delay may increase "threat[s] to public safety"). The D.C. Circuit, citing the Ninth Circuit's *Hawaii Helicopter* decision, has indicated that this standard is met where "delay could result in serious harm." *Jifry*, 370 F.3d at 1179-80. *See* 83 Fed. Reg. at 55949-50. And good cause applies "when an agency finds that due and timely execution of its functions would be impeded by the notice and comment otherwise required" under the APA. *Util. Solid Waste Activities Group v. EPA*, 236 F.3d 749, 754–55 (D.C. Cir. 2001). Examples of such circumstances include an agency determination that new rules were needed "to address threats posing a possible imminent hazard to aircraft, persons, and property within the United States," or were "of life-saving importance to mine workers in the event of a mine explosion," or were necessary to "stave off any imminent threat to the environment or safety or national security." *Mack Trucks, Inc. v. EPA,* 682 F.3d 87, 93 (D.C. Cir. 2012). Those standards are satisfied here.

The Departments recognized that pre-promulgation notice and comment or a delayed effective date "would result in serious damage to important interests" by encouraging a surge to enter the United States between ports of entry before the rule took effect and that each of those crossings risks the safety of aliens and Border Patrol agents. *See* 83 Fed. Reg. 55949-50. As the preamble to the rule explained, 396,579 aliens were apprehended in FY2018 entering unlawfully

between ports of entry, over 1,000 a day. *Id.* at 55948. Hundreds die each year making the dangerous border crossing. *See id.*[9] These crossings—which require at-large apprehensions—also "endanger[] . . . [federal] agents who seek to apprehend" these aliens. *Id.* at 55935. The Departments therefore concluded that immediate implementation is warranted because it will prevent a "rush" at the border before the rule goes into effect, steer the large groups of aliens en route to ports of entry, and avoid an *increase* in the already high number of aliens making the dangerous border crossing to beat the effective date of the rule. *Id.* at 55950. As the preamble explains, "[c]reating an incentive for members of those groups to attempt to enter the United States unlawfully before this rule took effect would make more dangerous their already perilous journeys, and would further strain CBP's apprehension operations." *Id.* Thus, this is a situation where "delay could result in serious harm." *Jifry*, 370 F.3d at 1179-80. Indeed, *Jifry* relies on *Hawaii Helicopter*, which found good cause based on a much lower level of safety risk than that presented here. *Id.* It is also consistent with prior regulatory changes to entry policies. As with prior border-policy changes, there is good cause to prevent "foreign nationals from undertaking dangerous border crossings, and thereby prevent the needless deaths and crimes associated with human trafficking and alien smuggling operations.'" *Id.* at 55950 (quoting 69 Fed. Reg. at 48878); *see id*. (citing prior uses of good-cause exception to address border-entry rules). This is also consistent with Congress's provision on changes to those subject to expedited removal, where modifications are permitted "at any time." 8 U.S.C. § 1225(b)(1)(A)(iii)(I). Avoiding a surge of illegal and dangerous border crossings where already hundreds die each year and over a thousand are apprehended each day satisfies the good-cause exception.

Plaintiffs' contrary arguments are meritless. Plaintiffs contend that there is no "exigency" warranting invocation of good cause because media reports suggested the government was considering a similar rule in another context in the summer of 2018. TRO Br. 38. But that the

[9] U.S. Border Patrol Fiscal Year Southwest Border Sector Deaths (FY 1998 - FY 2017), https://www.cbp.gov/sites/default/files/assets/documents/2017-Dec/BP%20Southwest%20Border%20Sector%20Deaths%20FY1998%20-%20FY2017.pdf (294 deaths in FY2017); *see also* https://missingmigrants.iom.int/region/americas?region=1422 (345 deaths thus far in 2018).

government did not previously promulgate a rule to address a different situation says nothing about whether it has good cause in *this* situation. Moreover, the only case Plaintiffs cite does not support them. *See Zhang v. Slattery*, 55 F.3d 732, 745 (2d Cir. 1995).[10] And Plaintiffs' claim that the government concedes that migrants will not be dissuaded from crossing the border illegally because withholding and CAT protection are available, TRO Br. 37-38, is a distortion of the rule, which notes that the rule, consistent with our international obligations, allows aliens who violate a proclamation to nevertheless apply for withholding and CAT relief. 83 Fed. Reg. at 55949. Indeed, in the same breath Plaintiffs misstate the rule, they claim this relief is "illusory." TRO Br. 40. Plaintiffs cannot have it both ways.

In any event, as discussed, and consistent with many rules regarding entry at the border, delaying the rule's effective date would harm life and public safety given the incentive to surge across the border before the rule takes effect. *See Nat'l Nutritional Foods Ass'n v. Kennedy*, 572 F.2d 377, 384–85 (2d Cir.1978) (good cause exists where "the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rule-making proceedings."). A notice-and-comment period that enables aliens to continue entering the country contrary to a Presidential proclamation, criminal law, and public safety is not the type of pause for inquiry needed to "ensure fairness to affected parties." *Int'l Union, United Mine Workers of Am. v. MSHA*, 407 F.3d 1250, 1259 (D.C. Cir. 2005).

Foreign Affairs. The APA's procedural requirements also do not apply here because the rule "involve[s]" a "foreign affairs function of the United States." 5 U.S.C. § 553(a)(1). The foreign-affairs exception covers agency actions "linked intimately with the Government's overall political agenda concerning relations with another country." *Am. Ass'n of Exporters v. United States*, 751 F.2d 1239, 1249 (Fed. Cir. 1985). "A rule of law that would inhibit the flexibility of

[10] *Zhang* involved an interim rule providing that individuals subject to China's one-child policy could be eligible for asylum. The Second Circuit noted the period of debate only in the context of the foreign-affairs exception, not the good-cause exception. 55 F.3d at 745-47. And the Second Circuit's rejection of the foreign-affairs exception was based on the absence of any record evidence. *Id.* at 745. Without such evidence, the court concluded, "the weight of such concerns is not obvious, particularly since the focus of the interim rule . . . had been at the center of a national debate for more than six months prior to the issuance of the rule." *Id*. That record is dramatically different than the one here, which demonstrates a current crisis requiring immediate action.

the political branches [in matters of foreign affairs] should be adopted with only the greatest caution." *Yassini v. Crosland*, 618 F.2d 1356, 1361 (9th Cir. 1980). Thus, the exception applies where a regulation is part of a larger action "carry[ing] out obligations to a foreign nation undertaken for purposes of resolving a problem requiring coordination." *Int'l Bhd. of Teamsters v. Pena*, 17 F.3d 1478, 1486 (D.C. Cir. 1994).

The Departments properly invoked this exception. First, as the Departments explained, "[t]he flow of aliens across the southern border, unlawfully or without appropriate travel documents, directly implicates the foreign policy interests of the United States." 83 Fed. Reg. at 55950. This same foreign-affairs rationale has repeatedly justified rules, like this one, that address the movement of individuals between nations. *See, e.g.*, 81 Fed. Reg. 14948, 14952 (Mar. 21, 2016) (invoking foreign-affairs exception in rule addressing flights to Cuba); 82 Fed. Reg. at 4904-05 (the exception applies "to travel and migration between the two countries"); *see also Raoof v. Sullivan*, 315 F. Supp. 3d 34, 43-44 (D.D.C. 2018) (rule imposing two-year foreign residence requirement prior to visa issuance "certainly relates to the foreign affairs and diplomatic duties" of the Executive Branch). Here, the rule and proclamation "necessarily implicate our relations with Mexico and the President's foreign policy, including sensitive and ongoing negotiations with Mexico about how to manage our shared border." 83 Fed. Reg. at 55950. The proclamation—by suspending entry at the southern border except at ports of entry—directly relates to that shared challenge at the border, and the rule—by "establish[ing] a mandatory bar to asylum eligibility resting squarely" on the proclamation—"confirms the direct relationship between the President's foreign policy decisions in this area and the rule." *Id*.

Second, the rule and proclamation directly relate to our ongoing negotiations with Mexico over our shared obligations to consider asylum claims from Northern Triangle countries, and with the Northern Triangle countries to address and control the flow of their nationals. As the Departments explained, "the vast majority of aliens who enter illegally today come from the Northern Triangle countries." *Id.* "Channeling those aliens to ports of entry would encourage these aliens to first avail themselves of offers of asylum from Mexico"—an important foreign policy objective of the President. *Id.*; *see* Proclamation (preamble). The proclamation and rule

work together to limit a problematic method of avoiding scrutiny of their claims by either country: first transiting Mexico and "reject[ing] opportunities to apply for asylum and benefits in Mexico" and then "[c]rossing the border to avoid detection" and inquiry into the viability of a claim for relief in the United States. Proclamation (preamble). Importantly, "the United States and Mexico have been engaged in ongoing discussions of a safe-third-country agreement"—an agreement like the one the United States has with Canada whereby aliens normally must seek asylum in the first country they enter, rather than transiting one country to seek asylum in another. 83 Fed. Reg. at 55950. By limiting illegal entries, and requiring orderly processing, the proclamation and rule will help "develop a process to provide this influx with the opportunity to seek protection at the safest and earliest point of transit possible" and "establish compliance and enforcement mechanisms for those who seek to enter the United States illegally, including for those who do not avail themselves of earlier offers of protection." *Id.*; *see* Proclamation (preamble) ("suspension will facilitate ongoing negotiations with Mexico and other countries regarding appropriate cooperative arrangements to prevent unlawful mass migration to the United States through the southern border"). In sum, the rule "will strengthen the ability of the United States to address the crisis at the southern border and therefore facilitate the likelihood of success in future negotiations." *Id.* Indeed, the proclamation's suspension will expire as soon as a safe-third-country agreement is reached that permits the removal of aliens to Mexico in accordance with law. Proclamation § 1.

These interlocking goals—gaining Mexico's assistance in securing our border and negotiating with countries to take more responsibility for migrants who first arrive in their territory—are all "linked intimately with the Government's overall political agenda concerning relations with another country." *Am. Ass'n of Exporters*, 751 F.2d at 1249. The choice of the Executive Branch here—to require aliens seeking asylum to undergo orderly processing at ports of entry after transiting Mexico where they could also request asylum—is a "[d]ecision[] involving the relationships between the United States and its alien visitors" that "implicate[s] our relations with foreign powers" and "implement[s] the President's foreign policy." *Yassini*, 618 F.2d at 1361. Indeed, this is a more straightforward case than *Yassini*, which involved Iranians *already in the United States* who were required to leave. *Id.* This case involves only aliens crossing an

international border entering the country in violation of law from an international partner with whom we are negotiating. The policy here comfortably "f[a]lls within the foreign affairs function and good cause exceptions to the notice and comment requirements of the APA." *Id.*

Plaintiffs' response is that the foreign-affairs exception should be construed narrowly, relying on *East Bay*. TRO Br. 38. But the *East Bay* court did not resolve this issue, and in any event was flawed on this score because it assumed judicial authority to second-guess the foreign-affairs determinations of the Executive Branch. *East Bay* TRO Order 26-27. Federal courts may not second-guess the Executive's predictions about future actions and risks, *see Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010), especially on foreign affairs, *see Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108, 116 (2013). Here, notice-and-comment rulemaking would slow and limit the ability to negotiate with Mexico and Northern Triangle governments, and a "prompt response" is needed to address the crisis at our southern border. *Yassini*, 618 F.2d at 1360.

Plaintiffs also assert that the government cannot invoke the foreign-affairs exception without actual evidence of a final diplomatic agreement. TRO Br. 39. But such a rule is contrary to the text of the APA, which refers to a "foreign affairs function," 5 U.S.C. § 553(a)(1)—not to finalized diplomatic agreements. Were it otherwise, the exception would be meaningless: the government would need to negotiate in secret before implementing the very rule designed to incentivize Mexico and the Northern Triangle countries to negotiate.

V. The Other Stay Factors Foreclose Issuing a TRO

A. Plaintiffs Cannot Demonstrate Irreparable Harm

Although Plaintiffs fail to demonstrate any of the four factors warranting an injunction, their failure to demonstrate irreparable harm is particularly compelling and the Court need go no further than this threshold failing in denying the motion.

"[T]he basis of injunctive relief in the federal courts has always been irreparable harm." *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995). The "failure to show any irreparable harm is therefore grounds for refusing to issue a preliminary injunction, even if the other three factors entering the calculus merit such relief." *Chaplaincy of Full Gospel*

Churches v. England, 454 F.3d 290, 297 (D.C. Cir. 2006). As this Court has recognized, "[t]he D.C. Circuit has set a high standard for irreparable injury. The injury must be unrecoverable; it must be both certain and great; [and] it must be actual and not theoretical." *Cal. Ass'n of Private Postsecondary Sch. v. DeVos*, No 17-cv-999, 2018 WL 5017749, at *6 (D.D.C. Oct. 16, 2018). A "mere 'possibility' of irreparable harm will not suffice"; rather, the injury must be "of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *Achagzai v. Broad. Bd. of Governors*, No. 14-cv-768, 2016 WL 471274, at *3-4 (D.D.C. Feb. 8, 2016) (Moss, J.). And when irreparable harm is lacking, that suffices to defeat a motion for preliminary injunction. *Id.* Plaintiffs fail this standard.

To start, movants have not met their burden of showing irreparable harm when what they seek to enjoin is already enjoined nationwide by another court. *See Pars Equality Ctr. v. Trump*, Case No. 1:17-cv-00255-TSC, ECF 84 (D.D.C. May 11, 2017). And even in cases where Plaintiffs filed a motion for a preliminary injunction *before* a nationwide injunction issued—which was not the case here, where the motion was filed after the injunction—courts stayed those requests after a nationwide injunction was issued. *See Hawaii v. Trump*, 2017 WL 536826 (D. Haw. Feb. 9, 2017); *Washington v. Trump*, 2017 WL 1050354 (W.D. Wash. Mar. 17, 2017); *Ali v. Trump*, 2017 WL 1057645 (W.D. Wash. Mar. 17, 2017); *Al-Mowafak v. Trump*, No. 3:17-cv-00557-WHO (N.D. Cal. Apr. 18, 2017), ECF No. 63. That is because the requirement that a party show irreparable harm restricts a court's authority to issue a duplicative nationwide injunction.

Similarly, here Plaintiffs cannot meet the demanding standard for showing irreparable harm. First, as described above, no Plaintiff is currently subject to the rule and, at best could be subject to it if it were not enjoined at some indeterminate point in the future. *See* Proposed Order, ECF 6-7, at 1-2. But the rule is currently already enjoined nationwide. *See East Bay Sanctuary Covenant v. Trump*, Case No. 3:18-cv-6810, ECF 43 (N.D. Cal. Nov. 19, 2018). The Northern District of California has, in effect, provided Plaintiffs with the full relief that they seek from this Court. Thus, Plaintiffs "have not demonstrated that they will suffer great, concrete, corroborated

and certain irreparable harm absent the injunctive relief" they seek from this Court.[11] *Jones*, 177 F. Supp. 3d at 548. Although the Northern District of California injunction is on appeal, it remains in effect at this time given the Ninth Circuit's order issued shortly before this filing. *See East Bay Sanctuary Covenant v. Trump*, 18-17274 (9th Cir.), Order dated Dec. 7, 2018. Plaintiffs thus cannot prove any imminent irreparable harm justifying an additional injunction from this Court. *See Winter*, 555 U.S. at 22 (must make "clear showing that the plaintiff is entitled to such relief."); *Pars Equality*, ECF No. 84 (recognizing that a nationwide injunction casts doubt on the imminence of any alleged harms).

And even if the injunction in the Northern District of California did not exist, Plaintiffs assertion that they *might* be removed, TRO Br. 40, ring hollow because there is still no concrete or imminent possibility that will happen. First, withholding and CAT provide the only mandatory protections to which they are entitled: there is no right to asylum or to enter the country, and receiving a discretionary benefit after engaging in dangerous illegal activity cannot form the basis for irreparable harm.[12] Moreover, five Plaintiffs have been served notices to appear for full removal proceedings, *see* Exs. A-E, G, that will take months if not years, and they may seek relief in the appropriate court of appeals. *See* 8 U.S.C. § 1252(a). The last Plaintiff, A.V., has not been scheduled for a credible-fear screening given her current criminal case, so the Court must speculate as to whether the rule will ever be applied to her. Ex. F.

Finally, Plaintiffs assert that *others* may be harmed because they may have to wait in Mexico before they may be allowed to enter the country at a port of entry. TRO Br. 10-11, 42. But Plaintiffs entered the country illegally, they did not wait like other lawful entrants, and cannot invoke the purported harm they avoided by virtue of cutting the line as a basis for their *own* harm. *See Blum v. Yaretsky*, 457 U.S. 991, 999 (1982). In any event, even if they could, nothing in the INA gives a person without appropriate travel documents the right to cross the border on demand, and the Executive Branch has the inherent and statutory authority to control the flow of travel

[11] Indeed, Plaintiffs' allegations of irreparable harm ignore the injunction and speak of the rule as if it has been applied to them. *See* TRO Br. 40-42.

[12] Plaintiffs complain that they may not receive work authorization if they cannot receive asylum. TRO Br. 40. But there is no right to asylum—it is discretionary—so there is no right to work authorization.

across the border based on operational constraints and safety concerns. *See, e.g.*, 6 U.S.C. § 202(2), (8); 8 U.S.C. §§ 1103(a)(1), (a)(3); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) (such decisions are "a fundamental act of sovereignty"). And even if any aliens might be exposed to harms in Mexico inherent in transiting through that country, TRO Br. 11-13, those harms would not be caused by the rule, but by third parties in Mexico not subject to U.S. law, and so could not be the basis for enjoining it. *See Arpaio v. Obama*, 797 F.3d 11, 21 (D.C. Cir. 2015). In fact, one of the rule's core purposes is to *prevent* aliens from exposing themselves to the very real dangers transiting Mexico presents. *See* 83 Fed. Reg. at 55950. So no harm can flow to Plaintiffs from any alleged metering, *see* TRO Br. 11-12, 42—which is not at issue in this case or the subject of the challenged rule.

B. The Balance of Harms Weighs Against a Preliminary Injunction

The final two factors required for preliminary injunctive relief—harm to the opposing party and the public interest—merge when the government is the party opposing an injunction. *Nken v. Holder*, 556 U.S. 418, 435 (2009). Here, Plaintiffs make no showing that its alleged "irreparable injury" outweighs the threatened harm that an injunction would cause Defendant, or that it would not "adversely affect [the] public interest." *Id.* Indeed, Plaintiffs fail to come to grips with the urgent need for the rule: the "significant increase in the number and percentage of aliens who seek admission or unlawfully enter . . . and then assert an intent to apply for asylum," 83 Fed. Reg. at 55944-45, who then "raise[] non-meritorious asylum claims, and secur[e] release into the country. *Id.* at 55935, 55946. Plaintiffs repeatedly suggest that the rule does not actually mean to prevent this urgent problem, TRO Br. 14-16, 18, 42, but the best evidence for what harms the rule seeks to mitigate is the rule itself—and as explained, those harms are significant and urgent.

Any order that enjoins a governmental entity from enforcing actions taken pursuant to statutes enacted by the duly elected representatives of the people constitutes an irreparable injury that weighs heavily against the entry of injunctive relief. *See New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977). It is always in the public interest to protect the country's borders and enforce its immigration laws. *See Landon v. Plasencia*, 459 U.S. 21, 34 (1982). And foreign-policy determinations are left to the political branches. *See, e.g.*, *Kiobel v. Royal Dutch*

Petroleum, 569 U.S. 108, 116 (2013). The Executive Branch—tasked with foreign relations—decided to "encourage . . . aliens to first avail themselves of offers of asylum from Mexico" and is engaging in international negotiations accordingly. 83 Fed. Reg. at 55950. Indeed, the rule seeks to prevent "needless deaths and crimes associated with human trafficking and alien smuggling operations" (*id.*) and ensures that aliens in the United States who are ineligible for asylum will not be returned to countries where they face a clear possibility of persecution or torture. Any injunction would undermine the separation of powers by blocking the Executive Branch's lawful use of its authority to serve these goals. *Adams v. Vance*, 570 F.2d 950, 954 (D.C. Cir. 1978) (reversing "injunctive relief [that] deeply intrudes into the core concerns of the executive branch"). Because Plaintiffs suffer no harm absent an injunction and an injunction would cause harm to the government, the balance of harms weighs against a preliminary injunction.

VI. Any Interim Relief, if Granted at All, Must Be Sharply Limited

Even if Plaintiffs were entitled to any relief, it would have to be strictly limited.

A. The Court May Not Issue Any Injunctive Relief Under Section 1252(e)(3)

First, this suit, and the preliminary-injunction motion , is premature. The D.C. Circuit has made clear that § 1252(e)(3) contemplates lawsuits "by, and only by, aliens against whom the new procedures ha[ve] been applied." *AILA*, 199 F.3d at 1359. (Section 1252(e) also bars class-action challenges in such suits. *See* 8 U.S.C. § 1252(e)(1).) Plaintiffs filed suit *before* the rule and proclamation were applied to any person who entered unlawfully and had received an order of removal, expedited or otherwise. Their suit is thus premature as to aliens in expedited removal proceedings, *see* 199 F.3d at 1360, or full removal proceedings, *see* 8 U.S.C. § 1252(a)(5), (b)(9), (d). So this Court cannot issue any order on the rule and proclamation to the extent that they apply to anyone in expedited removal.

Second, § 1252(e)(3) does not authorize the Court to order an injunction or issue relief that extends beyond the individuals subject to expedited removal determinations. To start, relief can extend only to the individual seeking relief that is subject to an expedited removal order. Congress's provided for "judicial review of determinations under section 1225(b) and its implementation." 8 U.S.C. § 1252(e)(3)(A). A "determination under section 1225(b) and its

implementation" is an individual "determin[ation] than an alien . . . is inadmissible" and "order[ed] . . . removed" or subject to expedited credible-fear screening and the implementation of those statutory provisions. *Id.* § 1225(b)(1)(A)(i) & (ii). In other words, this Court reviews—and can issue relief that extends only so far as—the expedited removal determinations of the individuals before the court. *AILA*, 199 F.3d at 1359 (claim may be brought "by, and only by, aliens against whom the new procedures ha[ve] been applied"). It is in the context of those "determinations under section 1225(b) and its implementation" that this Court "determin[es] . . . whether . . . a regulation, or a written policy . . . issued . . . to implement such section . . . is . . . in violation of law." 8 U.S.C. § 1252(e)(3)(A)(ii). Thus, if the Court finds that a regulation or policy violates the law, the appropriate relief is to vacate the expedited removal determination that was issued based on that erroneous policy. Such an order is then subject to expedited appeal. *Id.* § 1252(e)(3)(C) & (E). As the D.C. Circuit has explained, Congress imposed these limits "in order to cabin judicial review," and "Congress, having barred class actions," did not "intend[] to permit actions on behalf of a still wider group of aliens, actions in which no class representative appears as a party and the plaintiffs are unconstrained by the requirements of Federal Rule of Civil Procedure 23." *AILA*, 199 F.3d at 1359, 1364; *see* Relief is therefore limited under § 1252(e)(3) to the individual parties before this Court.

Third, the statute precludes injunctive relief. Section 1252(e)(1), which limits the scope of relief that the Court can provide under § 1252(e)(2) and (3), provides that "[w]ithout regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may . . . enter *declaratory, injunctive, or other equitable relief* in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title *except as specifically authorized in a subsequent paragraph of this subsection*." 8 U.S.C. § 1252(e)(1). No other "subsequent paragraph" of § 1252(e) authorizes courts to enter a preliminary injunction. Section 1252(e)(3) is silent on this point, so it cannot be read to *affirmatively* authorize what § 1252(e)(1) explicitly forbids. *See INS v. Pangilinan*, 486 U.S. 875, 883 (1988) ("courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law"). Instead, the sole specifically authorized remedy that § 1252(e)(3) affords is a

"determination[]" on the merits—not preliminary equitable relief—regarding the validity of the policies before it in the context of an individual expedited removal order, 8 U.S.C. § 1252(e)(3)(A), and an "order" to that effect, *id.* § 1252(e)(3)(C). That provision, which authorizes a "determination," does not "specifically authorize[]" equitable relief. *Id.* § 1252(e)(1)(A); *compare id.* § 1252(e)(4)(B) (specifically authorizing delimited equitable relief in habeas). Importantly, the number of expedited removals in a year are in the hundreds of thousands, and there is no right under the Constitution to obtain court consideration of a request to enter the country. In this context, Congress did not intend for preliminary relief, based on equitable factors, to be obtained by individual persons subject to expedited removal or for relief to extend beyond that individual case. Instead, challenges would go forward without interfering with expedited removal until—if the Supreme Court determines that the issue warrants its attention—there is a final binding determination that the policy is not lawful. *See id.* § 1252(e)(3)(D); *id.* § 1252(f)(1) (only Supreme Court may "enjoin or restrain the operation of the provisions" governing removal).[13]

Thus, for the rule's application to expedited removal or credible-fear procedures, the Court cannot enter any interim relief, and even if it can, that relief must be limited to Plaintiff A.V.

B. The Court Cannot Enjoin Operation of the Rule under the APA

For the five Plaintiffs presently ordered to appear for full removal proceedings, the sole

[13] If this Court determines that § 1252(e)(3) is ambiguous, it "must be read in [its] context and with a view to [its] place in the overall statutory scheme." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). The legislative history of IIRIRA, which added § 1252 and established expedited removal, shows that Congress generally intended that only "the Supreme Court [has the authority] to enjoin the operation" of the expedited removal scheme. H.R. Rep. No. 104-469(I), "Immigration in the National Interest Act of 1995" (Mar. 4, 1996). The limitations on relief "do not preclude challenges to . . . new procedures, but the procedures will remain in force while such lawsuits are pending." *Id.* "[S]ingle district courts or courts of appeal do not have authority to enjoin" such procedures but may only "issue injunctive relief pertaining to the case of an individual alien." *Id.*; *see also* 8 U.S.C. § 1252(f)(1). It would make no sense for Congress to have precluded injunctive relief in this way in the general scheme, to reiterate that restriction on equitable relief in (e)(3), and to also expressly bar class actions, only to then nonetheless permit, with no clear statement, broad injunctive remedies that extended beyond the individual seeking relief in the expedited removal scheme under § 1252(e)(3), where Congress sought to limit court involvement the most given the need for border operations to be unimpeded. *See AILA*, 199 F.3d at 1364 ("Our analysis of the statute, and particularly the bar on class actions, strengthens the judicial presumption against suits seeking relief for a large and diffuse group of individuals, none of whom are parties to the lawsuit").

available remedy would be to a stay of the application of the rule to them—and only them—while the case continues on the merits. If this Court were to ultimately hold that the government needs to engage in notice-and-comment rulemaking, the remedy—*after* a determination on the merits—would be to remand the case to the agencies for that rulemaking. *See, e.g.*, *Air Transp. Ass'n of Am. v. Dep't of Transp.*, 900 F.2d 369, 379 (D.C. Cir. 1990); *Nat'l Ass'n of Farmworkers Orgs. v. Marshall*, 628 F.2d 604, 623 (D.C. Cir. 1980) (enjoining a rule until notice and comment has been completed). At this intermediate stage, the APA itself provides that the Court may "to the extent necessary to prevent irreparable injury," only "preserve [the] status or rights [of plaintiffs] pending conclusion of the review proceedings." 5 U.S.C. § 705. That provision does not "confer authority to grant relief" beyond the narrow confines of permitting *appellate* courts "to issue appropriate writs in aid of [their] jurisdiction." *Sampson v. Murray*, 415 U.S. 61, 69, 73, & n.15 (1974); *cf. National Mining Association v. United States Army Corps of Engineers*, 145 F.3d 1399 (D.C.Cir.1998) (allowing *permanent* injunction on facts of that case after decision on the merits). In allowing preliminary injunctions only "to the extent necessary to prevent irreparable injury," the APA thus codifies the principle that preliminary injunctions are not designed to "enjoin all possible breaches of the law," but rather to "remedy the specific harms" allegedly suffered by plaintiffs themselves. *Zepeda v. INS*, 753 F.2d 719, 728 n.1 (9th Cir. 1983). Indeed, a TRO "should be restricted to" "preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing and no longer," *Granny Goose Foods, Inc. v. Bhd. of Teamsters*, 415 U.S. 423, 439 (1974), and relief must be "as narrow as possible to prevent the irreparable injury" of Plaintiffs—and only Plaintiffs. *Cal. Hosp. v. Maxwell-Jolly*, 2011 WL 464008 *1 (E.D. Cal. Feb. 4, 2011). Accordingly, to the extent any Plaintiff may even raise an APA claim, notwithstanding the jurisdictional bars discussed above, any relief must be narrowly tailored to address only the cognizable injuries of these plaintiffs.

C. The Court May Not Issue a Nationwide Injunction

Finally, even if the Court were to issue some sort of temporary relief, the Court lacks authority to enjoin rule rule's application nationwide as Plaintiffs request. ECF No. 6-7. Article III and equitable principles require that relief be no broader than necessary to redress the Plaintiffs'

injuries. Under Article III, "[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury," *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018), especially at this stage, where the purpose of any TRO or injunction is to "preserve the relative positions of the parties until a trial," *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). And the rule in equity is that injunctions "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). Indeed, nationwide injunctions "did not emerge until a century and a half after the founding," and they "take a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch." *Hawaii*, 138 S. Ct. at 2425 (Thomas, J., concurring).

CONCLUSION

The Court should deny the motion for a TRO or preliminary injunction.

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Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

SCOTT G. STEWART
Deputy Assistant Attorney General

AUGUST E. FLENTJE
Special Counsel

WILLIAM C. PEACHEY
Director

By: /s/ *Erez Reuveni*
EREZ REUVENI
Assistant Director
Office of Immigration Litigation
U.S. Department of Justice, Civil Division
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
Tel: (202) 307-4293
Email: Erez.R.Reuveni@usdoj.gov

PATRICK GLEN
Senior Litigation Counsel

JOSEPH A. DARROW
FRANCESCA GENOVA
KATHRYNE M. GRAY
CHRISTINA GREER
BENTON YORK
Trial Attorneys

Attorneys for Defendants

Dated: December 7, 2018

CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States District Court for the District of Columbia by using the CM/ECF system. Counsel in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

By: */s/ Erez Reuveni*
EREZ REUVENI
Assistant Director
United States Department of Justice
Civil Division

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

O.A., *et al.*, *Plaintiffs,*	)	
v.	)	No. 1:18-cv-02718-RDM
Donald J. Trump, *et al.*, *Defendants.*	)	

DECLARATION OF DAVID W. STRANGE

I, David W. Strange, pursuant to 28 U.S.C. § 1746, and based upon my information made known to me in the course of my employment, hereby declare as follows:

(1) I am the Assistant Chief over the e3 Processing system. I have held this position since November, 2015. In this position, I manage the e3 Processing system in which Border Patrol agents input information about subjects who are processed by the U.S. Border Patrol.

(2) I have reviewed the U.S. Border Patrol's information in the e3 Processing system regarding [redacted] who, based upon my review of the information in the e3 Processing system, appears to be plaintiff C.A. That acronym is used below. The information in this declaration is based upon the information in the e3 Processing system.

(3) C.A. entered the United States on November 13, 2018, by crossing the Rio Grande River near El Paso, Texas. He was accompanied with the person designated in a separate declaration as D.S., who claims to be his mother.

(4) C.A. was transported to the Paso Del Norte Border Patrol Processing Center for processing by U.S. Border Patrol agents on November 13, 2018.

(5) C.A. was processed by U.S. Border Patrol and given a Warrant of Arrest/Notice to Appear on November 13, 2018.

(6) CBPs records do not reflect any current pending expedited removal proceedings or that C.A. is currently subject to an order of expedited removal.

Executed this **7th** day of **December, 2018**.

David W. Strange
Assistant Chief
U.S. Border Patrol
U.S. Customs and Border Protection

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

O.A., *et al.*, *Plaintiffs,*	)	
v.	)	No. 1:18-cv-02718-RDM
Donald J. Trump, *et al.*, *Defendants.*	)	

DECLARATION OF DAVID W. STRANGE

I, David W. Strange, pursuant to 28 U.S.C. § 1746, and based upon my information made known to me in the course of my employment, hereby declare as follows:

(1) I am the Assistant Chief over the e3 Processing system. I have held this position since November, 2015. In this position, I manage the e3 Processing system in which Border Patrol agents input information about subjects who are processed by the U.S. Border Patrol.

(2) I have reviewed the U.S. Border Patrol's information in the e3 Processing system regarding [redacted] who, based upon my review of the information in the e3 Processing system, appears to be plaintiff D.S. That acronym is used below. The information in this declaration is based upon the information in the e3 Processing system.

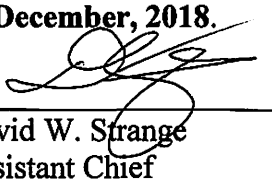
(3) D.S. entered the United States on November 13, 2018, by crossing the Rio Grande River near El Paso, Texas. She claimed to be the mother of the person designated in a separate declaration as C.A., a minor traveling with her.

(4) D.S. was transported to the Paso Del Norte Border Patrol Processing Center for processing by U.S. Border Patrol agents on November 13, 2018.

(5) D.S. was processed by U.S. Border Patrol and given a Warrant of Arrest/Notice to Appear on November 13, 2018.

(6) CBPs records do not reflect any current pending expedited removal proceedings or that D.S. is currently subject to an order of expedited removal.

Executed this **7th** day of **December, 2018**.



David W. Strange
Assistant Chief
U.S. Border Patrol
U.S. Customs and Border Protection

EXHIBIT C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

O.A., *et al.*, *Plaintiffs,*	)	
v.	)	No. 1:18-cv-02718-RDM
Donald J. Trump, *et al.*, *Defendants.*	)	

DECLARATION OF DAVID W. STRANGE

I, David W. Strange, pursuant to 28 U.S.C. § 1746, and based upon my information made known to me in the course of my employment, hereby declare as follows:

(1) I am the Assistant Chief over the e3 Processing system. I have held this position since November, 2015. In this position, I manage the e3 Processing system in which Border Patrol agents input information about subjects who are processed by the U.S. Border Patrol.

(2) I have reviewed the U.S. Border Patrol's information in the e3 Processing system regarding [redacted] who, based upon my review of the information in the e3 Processing system, appears to be plaintiff G.Z. That acronym is used below. The information in this declaration is based upon the information in the e3 Processing system.

(3) G.Z. entered the United States on November 10, 2018, in the El Paso, Texas, Border Patrol Sector.

(4) G.Z. was subsequently transported to the Clint Border Patrol Station in Clint, Texas, for processing by U.S. Border Patrol agents.

(5) [redacted]

(6) G.Z. was processed by U.S. Border Patrol and given a Warrant of Arrest/Notice to Appear on November 11, 2018.

(7) CBPs records do not reflect any current pending expedited removal proceedings or that G.Z. is currently subject to an order of expedited removal.

Executed this **7th** day of **December, 2018**.

David W. Strange
Assistant Chief
U.S. Border Patrol
U.S. Customs and Border Protection

EXHIBIT D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

O.A., *et al.*, *Plaintiffs,*	)	
v.	)	No. 1:18-cv-02718-RDM
Donald J. Trump, *et al.*, *Defendants.*	)	

DECLARATION OF DAVID W. STRANGE

I, David W. Strange, pursuant to 28 U.S.C. § 1746, and based upon my information made known to me in the course of my employment, hereby declare as follows:

(1) I am the Assistant Chief over the e3 Processing system. I have held this position since November, 2015. In this position, I manage the e3 Processing system in which Border Patrol agents input information about subjects who are processed by the U.S. Border Patrol.

(2) I have reviewed the U.S. Border Patrol's information in the e3 Processing system regarding [redacted] who, based upon my review of the information in the e3 Processing system, appears to be plaintiff K.S. That acronym is used below. The information in this declaration is based upon the information in the e3 Processing system.

(3) K.S. entered the United States on November 13, 2018, by crossing the Rio Grande River near El Paso, Texas. She was accompanied with the person designated in a separate declaration as O.A., who claimed to be her father.

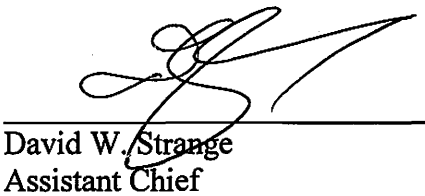
(4) K.S. was transported to the Paso Del Norte Border Patrol Processing Center for processing by U.S. Border Patrol agents on November 13, 2018.

(5) [redacted]

(6) K.S. was processed by U.S. Border Patrol and given a Notice to Appear on November 15, 2018.

(7) CBPs records do not reflect any current pending expedited removal proceedings or that K.S. is currently subject to an order of expedited removal.

Executed this **7th** day of **December, 2018**.



David W. Strange
Assistant Chief
U.S. Border Patrol
U.S. Customs and Border Protection

EXHIBIT E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

O.A., *et al.*, *Plaintiffs,*	)	
v.	)	No. 1:18-cv-02718-RDM
Donald J. Trump, *et al.*, *Defendants.*	)	

DECLARATION OF DAVID W. STRANGE

I, David W. Strange, pursuant to 28 U.S.C. § 1746, and based upon my information made known to me in the course of my employment, hereby declare as follows:

(1) I am the Assistant Chief over the e3 Processing system. I have held this position since November, 2015. In this position, I manage the e3 Processing system in which Border Patrol agents input information about subjects who are processed by the U.S. Border Patrol.

(2) I have reviewed the U.S. Border Patrol's information in the e3 Processing system regarding [redacted] who, based upon my review of the information in the e3 Processing system, appears to be plaintiff O.A. That acronym is used below. The information in this declaration is based upon the information in the e3 Processing system.

(3) O.A. entered the United States on November 13, 2018, by crossing the Rio Grande River near El Paso, Texas. He claimed to be the father of the person designated in a separate declaration as K.S., a minor traveling with him.

(4) O.A. was transported to the Paso Del Norte Border Patrol Processing Center for processing by U.S. Border Patrol agents on November 13, 2018.

(5) [redacted]

(6) O.A. was processed by U.S. Border Patrol and given a Warrant of Arrest/Notice to Appear on November 15, 2018.

(7) CBPs records do not reflect any current pending expedited removal proceedings or that O.A. is currently subject to an order of expedited removal.

Executed this **7th** day of **December, 2018**.

David W. Strange
Assistant Chief
U.S. Border Patrol
U.S. Customs and Border Protection

EXHIBIT F

DECLARATION OF DWAIN R. HOLMES

I, Dwain R. Holmes, hereby declare:

1. I am a Supervisory Border Patrol Agent assigned to the San Diego Sector Prosecutions Unit for the U.S. Border Patrol. I have held this position since September 22, 2013. My responsibilities include overseeing and managing the prosecutions office for San Diego Sector Border Patrol. This includes overseeing criminal prosecutions presented and prosecuted through the U.S. Attorney's Office and coordinating with the Border Patrol and Immigrations and Customs Enforcement (ICE) regarding the removal of certain aliens apprehended by Border Patrol.

2. On November 11, 2018 at approximately 9:54 P.M., the Border Patrol arrested A[redacted]V[redacted] was referred for prosecution for her illegal entry into the United States pursuant to Title 8 United States Code 1325. On November 12, 2018 at approximately 2:10 A.M., [redacted] was questioned after being read her Miranda rights. Since there was no court being held on November 12, 2018, as it was a holiday, a complaint and probable cause statement was sent to a Magistrate Judge for probable cause review. The Judge reviewed it and found probable cause to continue with the case. [redacted] was booked into the Metropolitan Correctional Center and turned over to the U.S. Marshals Service (USMS) November 13, 2018 at 5:30 A.M., and appeared in court that afternoon. To date, [redacted] has not posted bond and has remained in USMS custody throughout the proceedings.

3. [redacted] has additionally appeared in court for status hearings on November 19, 2018 and December 3, 2018. On December 3, 2018, [redacted] through her attorney, made a request for a trial date and currently has a status hearing set for December 14, 2018.

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4. Once [redacted] is released from USMS custody pursuant to a conviction or a dismissal, [redacted] will be taken into Border Patrol custody and turned over to ICE/ERO for Expedited Removal proceedings.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Executed this 6th day of December, 2018, at San Diego, California.

DWAIN R. HOLMES
Supervisory Border Patrol Agent
San Diego Sector Prosecutions Unit
U.S. Customs and Border Protection
Department of Homeland Security

EXHIBIT G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

O.A., *et al.*, *Plaintiffs,*	)	
v.	)	No. 1:18-cv-02718-RDM
Donald J. Trump, *et al.*, *Defendants.*	)	

DECLARATION OF JENNIFER L. RELLIS

I, Jennifer L. Rellis, pursuant to 28 U.S.C. § 1746, and based upon my information made known to me in the course of my employment, hereby declare as follows:

(1) I am the Acting Deputy Chief of the U.S. Citizenship and Immigration Services (USCIS) Asylum Division. I have held this position since October 29, 2018. In this role I assist the Chief in managing the Asylum Division and I am familiar with the implementation of the interim final rule. My current permanent position is as the Deputy Director of the Arlington Asylum Office. I have been in that position since November 2015.

(2) I have reviewed the USCIS information regarding the Plaintiffs in this case, O.A., K.S., A.V., G.Z., D.S., and C.A. The information in this declaration is based upon that information.

(3) My review reflects that O.A., K.S., A.V., G.Z., D.S., and C.A., have not, to date, been subject to credible fear procedures because they have never been interviewed by a USCIS asylum officer.

(4) My review further reflects that O.A., K.S., G.Z., D.S., and C.A., were each issued Notices to Appear pursuant to 8 U.S.C. 1229a, under procedures that predate the rule at issue in this litigation, vacating any expedited removal order issued to them, and will not be subject to credible fear procedures in the future, as they are now in removal proceedings pursuant to 8 U.S.C. 1229a.

(5) My review further reflects that A.V. has not been referred to USCIS for a credible fear interview. It is impossible to predict if that will happen in the future, given that she is presently being prosecuted for illegal entry and is not currently subject to credible fear screening procedures.

Executed this **7th** day of **December, 2018**.

Jennifer L. Rellis
Acting Deputy Chief, Asylum Division
U.S. Citizenship and Immigration Services

EXHIBIT H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

O.A., *et al.*, *Plaintiffs,*	)	
v.	)	No. 1:18-cv-02718-RDM
Donald J. Trump, *et al.*, *Defendants.*	)	

DECLARATION OF RICHARD HUGHES

I, Richard Hughes, pursuant to 28 U.S.C. § 1746, and based upon information made known to me in the course of my official duties, hereby declare as follows:

(1) I am a paralegal at the Office of Legal Counsel ("OLC"). I have held this position since June 2004.

(2) As a paralegal acting on behalf of OLC, I personally delivered the asylum IFR at issue in this case by hand to the Office of the Federal Register on November 6, 2018.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 7th day of December, 2018.

Richard Hughes
Paralegal
Office of Legal Counsel
U.S. Department of Justice

EXHIBIT I

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

O.A., *et al.*, *Plaintiffs,*	)	
v.	)	No. 1:18-cv-02718-RDM
Donald J. Trump, *et al.*, *Defendants.*	)	

DECLARATION OF ROSEMARY HART

I, Rosemary Hart, pursuant to 28 U.S.C. § 1746, and based upon information made known to me in the course of my official duties, hereby declare as follows:

(1) I am Special Counsel at the Office of Legal Counsel ("OLC"). I have held various positions at OLC since 1987.

(2) As Special Counsel at the OLC, I sent two e-mails stating that the asylum IFR at issue in this case was delivered from OLC to the Office of the Federal Register ("OFR") on November 6, 2018. I sent both e-mails on November 21, 2018. The first e-mail was sent to August Flentje and the second e-mail was sent to Sarah Harris and August Flentje.

(3) Attached as Exhibit 1 to this declaration is a true and correct copy of the e-mails described in paragraph two.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 7th day of December, 2018.

Rosemary Hart
Special Counsel
Office of Legal Counsel
U.S. Department of Justice

[redacted]

From: Hart, Rosemary (OLC)
Sent: Wednesday, November 21, 2018 7:39 PM
To: Harris, Sarah (OLC); Flentje, August (CIV)
Subject: RE: IFR Status

Our delivery was made at 1:09 p.m. and I think the OFR logged it in at 1:30 p.m. But I will have to check on Friday to confirm.

Rosemary Hart
Special Counsel
Office of Legal Counsel
U.S. Department of Justice
[redacted]

From: Harris, Sarah (OLC)
Sent: Wednesday, November 21, 2018 7:35 PM
To: Flentje, August (CIV) <[redacted]>
Cc: Hart, Rosemary (OLC) <[redacted]>
Subject: Fwd: IFR Status

See below for delivery (transmittal) to OFR timing. We can also identify the time when OFR accepted the rule, although that shouldn't be as material.

Sent from my iPhone

Begin forwarded message:

> **From:** "Hart, Rosemary (OLC)" <[redacted]>
> **Date:** November 6, 2018 at 1:36:09 PM EST
> **To:** "Hamilton, Gene (OAG)" <[redacted]>, "Edlow, Joseph B. (OLP)" <[redacted]>, "Escalona, Prim F. (OLA)" <[redacted]>, "Harris, Sarah (OLC)" <[redacted]>, "Wetmore, David H. (ODAG)" <[redacted]>, "McHenry, James (EOIR)" <[redacted]>, "Boyd, Stephen E. (OLA)" <[redacted]>
> **Subject: RE: IFR Status**
>
> The package was delivered to the OFR at 1:09 p.m. today.
>
> *Rosemary Hart*
> *Special Counsel*
> *Office of Legal Counsel*
> *U.S. Department of Justice*
> [redacted]

JOSEPH H. HUNT
Assistant Attorney General
SCOTT G. STEWART
Deputy Assistant Attorney General
AUGUST E. FLENTJE
Special Counsel
WILLIAM C. PEACHEY
Director
EREZ REUVENI
Assistant Director
Office of Immigration Litigation
U.S. Department of Justice, Civil Division
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
Tel: (202) 307-4293
Email: Erez.R.Reuveni@usdoj.gov
PATRICK GLEN
Senior Litigation Counsel
JOSEPH A. DARROW
FRANCESCA GENOVA
KATHRYNE M. GRAY
CHRISTINA GREER
BENTON YORK
Trial Attorneys

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

O.A., *et al.*, Plaintiffs, v. Donald J. Trump, President of the United States, *et al.*, Defendants.	**[PROPOSED] ORDER** Civil Action No. 1:18-cv-02718-RDM

Before the Court is the Plaintiffs' motion for a preliminary injunction. Having reviewed the motion, Defendants' opposition, and any reply, IT IS HEREBY ORDERED that the motion is DENIED.

Issued this ____ day of _____, 2018.

_____
United States District Judge